No. 2304

United States

Circuit Court of Appeals

For the Ninth Circuit

GEORGE M. TAGGART,

Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

SHAW & BORDEN CO. 141085

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SHAW & BORDEN CO. 141065

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In the United States District Court for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

NAMES AND ADDRESSES OF SOLICITORS OF RECORD.

C. J. FRANCE, Solicitor for Complainant,
436-439 Burke Building, Seattle, Washington.

FRANK P. HELSELL, Solicitor for Complainant,
436-439 Burke Building, Seattle, Washington.

F. V. BROWN, Solicitor for Defendant,
King Street Station, Seattle, Washington.

CHARLES S. ALBERT, Solicitor for Defendant,
Great Northern Passenger Station, Spokane, Wash.

THOMAS BALMER, Solicitor for Defendant,
Great Northern Passenger Station, Spokane, Wash.

District Court of the United States, Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

SUBPOENA IN EQUITY.

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To The Great Northern Railway Company, a Corporation:

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States aforesaid, at the Court Room, of said Court, in the City of Spokane, Washington, on the 6th day of January, 1913, to answer a Bill of Complaint filed against you in said Court by George M. Taggart, a citizen of the State of Washington, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable FRANK H. RUDKIN, Judge of the United States District Court for the Eastern District of Washington, and the seal of said District Court this 25th day of November, 1912.

(Signed) W. H. HARE, Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT, U. S.

YOU ARE HEREBY REQUIRED to enter your appearance in the above mentioned suit on or before the first Monday of January, 1913, next at the Clerk's Office of said Court, pursuant to said Bill, otherwise the said Bill will be taken pro confesso.

(SEAL) (Signed) W. H. HARE, Clerk.

United States of America,
Eastern District of Washington,—ss.

I HEREBY CERTIFY, That I served the within writ by delivering to and leaving a true copy thereof with D. G. Black, General Agent for the Great Northern Railway Company in Spokane, Washington, on the 26th day of November, 1912, and at the same time and in the same manner I served upon the said D. G. Black a copy of the Bill of Complaint herein.

Fees: $4.06.

November 26, 1912.

(Signed) W. A. HALTEMAN,
United States Marshal,
By A. M. DAILEY,
Deputy.

Endorsements: Subpoena in Equity.

Issued November 25, 1912, and returned and filed in the U. S. District Court for the Eastern District of Washington, November 26, 1912.

W. H. HARE, Clerk,
By S. M. RUSSELL, Deputy.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. .....

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

BILL IN EQUITY.

To the Judge of the District Court of the United States for the Eastern District of Washington:

George M. Taggart, a citizen of the State of Washington residing in Chelan County in said State, brings this his Bill against the Great Northern Railway Company, a corporation, organized and existing under the laws of the State of Minnesota, having its principal place of business in St. Paul in said State, and a citizen and inhabitant of the said State.

Therefore your orator complains and says:

I.

That your orator is a citizen and resident of the State of Washington residing in Chelan County in said State, and the defendant, Great Northern Railway Company, is a corporation organized and existing under the laws of the State of Minnesota, having its principal place of business in St. Paul in said State, and a citizen and inhabitant of the said State.

II.

That your orator on or about September 17, 1907, filed in the United States Land Office at Waterville, Washington, his homestead entry upon

Lot Four (4) and the Southeast Quarter (¼) of the Northwest Quarter (¼) of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, W. M., in Chelan County, Washington; that on said date said homestead entry was by the officials of said local Land Office duly allowed; that thereupon your orator entered and resided upon said land and improved the same by the cultivation of the soil, by the erection of farm buildings, by the planting of seventeen acres of fruit trees and the installation of a pumping system for irrigation purposes.

III.

That thereafter the United States issued to your orator a patent to said land conveying the full fee simple title in and to said land to your orator.

IV.

That your orator has ever since the 17th day of September, 1907, been in full, free and unobstructed possession of said land, has improved the same in the manner above set forth, and has at all times owned and claimed to own the full and unincumbered title to said land.

V.

That defendant is a railroad corporation and is now engaged in constructing a branch of its railroad from Wenatchee in said State of Washington North along the Columbia River and is threatening to trespass upon the

land of your orator above described and construct a railroad line over and across the said land of your orator, without the permission of your orator and without any right whatsoever; that defendant in constructing said railroad line threatens to make a deep cut across the middle of the land of your orator, ranging in depth from thirty to fifteen feet; that defendant further threatens to take possession of a right of way across the land of your orator to the width of two hundred feet; that if defendant is permitted to build said line as it threatens so to do, it will separate the farm of your orator in two parts by means of a deep cut; that it will take or destroy at least two hundred and twenty-five fruit trees belonging to your orator, take a strip of land two hundred feet wide by sixteen hundred and fifty feet long across the farm of your orator and interfere with and disturb the irrigation system upon said land.

VI.

That the value of the land which defendant threatens to take together with the damage which will accrue to your orator and to the land above described by reason of the acts which defendant threatens to perform greatly exceeds the sum of Three Thousand ($3000) Dollars.

VII.

That your orator has no speedy and adequate remedy at law to relieve from the acts which the defendant threatens to perform.

WHEREFORE your orator prays that this Honorable Court issue an order directing defendant to show cause on a day certain why a preliminary injunction

should not issue *pendente lite* restraining said defendant, its agents, attorneys and employees from trespassing upon the land of your orator above described and from constructing said railroad line, as above set forth, across the land of your orator and upon the hearing of said order to show cause your orator prays a preliminary injunction restraining said defendant, its agents, attorneys, and employees from performing the acts above set forth issue, pending the determination of this cause upon its merits, and that upon the final hearing of this cause the Court decree that said defendant be permanently enjoined from committing the acts specified above; and your orator further prays that if prior to the time an order or decree is entered in this cause restraining said defendant from the acts above set forth the said defendant shall have committed said acts that this Court restrain the said defendant from operating or maintaining said line of railroad, and by a mandatory decree of this Court direct that said railroad be removed, and your orator prays for such other general relief as to the Court may seem just and equitable.

To the end that your orator may obtain relief prayed for herein, he further prays that the Court do grant him process by subpoena directing the Great Northern Railway Company, a corporation, defendant named herein, to appear and answer, under oath, all of the allegations of the bill herein filed.

FRANCE & HELSELL,
Solicitors for Complainant.

State of Washington,
County of King,—ss.

Personally appeared before the undersigned this 16th day of November, 1912, the complainant in the above cause, who being first duly sworn, as to the truth of the allegations made in the above bill, says that he has read the foregoing bill, knows the contents thereof, and that the same is true of his own knowledge.

C. G. RIDOUT,

(Seal) Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Bill in Equity.

Filed in the U. S. District Court, Eastern District of Washington, Nov. 25, 1912.

WM. H. HARE, Clerk.
By S. M. RUSSELL, Deputy.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. .....

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

NOTICE OF APPLICATION FOR PRELIMINARY INJUNCTION.

To the Great Northern Railway Company, a corporation:

You will please take notice that upon Monday, December 9, 1912, at 10 o'clock A. M. the complainant in the above entitled action will apply to the above entitled Court at the Court Room of said Court in Spokane, Washington, for a preliminary injunction restraining defendant from performing the acts set forth in the attached application and the bill in equity on file herein.

FRANCE & HELSELL,
Solicitors for Complainant.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. .....

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

APPLICATION FOR PRELIMINARY INJUNCTION.

Comes now the complainant and moves the Court to issue a preliminary injunction in this cause restraining the defendant, Great Northern Railway Company, from building or attempting to build a railroad line across the land of your complainant, situated in Chelan County, Washington, and described as follows:

Lot Four (4) in Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, W. M.

This motion is based upon the bill of complaint on file herein and upon such affidavits as may hereafter be filed.

FRANCE & HELSELL,
Solicitors for Complainant.

Indorsed: Application for Preliminary Injunction and Notice.

Filed in the U. S. District Court, Eastern Dist. of Washington, Nov. 25, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

IN EQUITY.

ANSWER OF THE GREAT NORTHERN RAILWAY COMPANY, A CORPORATION, DEFENDANT, TO THE BILL OF COMPLAINT.

This defendant now, and at all times hereafter, reserving any and all manner of benefit or advantage of exceptions that can or may be had or taken to the many errors, uncertainties and imperfections of the bill of complaint of the complainant herein, comes and answers thereto, or to such portions thereof as this defendant is advised are material to be answered, and says:

I.

Specifically answering the allegations of Paragraph I of said bill, this defendant admits that said complainant is a citizen and resident of the State of Washington, residing in Chelan County in said state, and that said defendant is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in St. Paul in said state, and a resident and inhabitant of the State of Minnesota.

II.

Specifically answering the allegations of Paragraph II of said complaint, this defendant admits that said complainant, at the time therein stated, filed in the United States Land Office at Waterville, Washington, his homestead entry upon Lot Four (4) and the southeast quarter of the northwest quarter of Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., in Chelan County, Washington, and that said homestead entry was thereupon allowed by the officials of said local Land Office. Defendant admits that said complainant entered and resided upon said land and improved portions of the same by the cultivation of the soil, by the erection of farm buildings, and by the planting of several acres of fruit trees, and the installation of a pumping system for irrigation purposes.

III.

Defendant admits that thereafter, and on to-wit, February 3rd, 1912, the United States issued to said complainant a patent, describing all of said land; to so much of said paragraph as alleges that said patent conveyed

to complainant the full fee simple title to said land, this defendant says that it denies that said patent conveyed the full fee simple title, or any title to the strip of land hereinafter referred to and more particularly described, which defendant proposes to occupy across said Lot Four (4).

IV.

Specifically answering the allegations of Paragraph IV of said bill, this defendant admits that said complainant is now, and for some time past has been, in the possession of a portion of said land, but this defendant denies that it has any knowledge or information sufficient to form a belief, or any belief, as to whether said complainant has been in such possession since said 17th day of September, 1907, or as to when said complainant went into possession of said land. Defendant admits that said complainant has improved a portion of said land in the manner above set forth. To so much of said paragraph as alleges that said complainant has at all times owned and claimed to own the full and unencumbered title to said land, this defendant says that said complainant has never owned the full or unencumbered title, or any title, to the strip of land across said Lot, hereinafter described, and said defendant denies that it has any knowledge or information, sufficient to form a belief, as to whether said complainant has at all times, or ever claimed to own said strip, and therefore denies that said complainant has ever claimed to own the same.

V.

Specifically answering the allegations of Paragraph V of said bill, this defendant admits that it is a rail-

road corporation, and is now engaged in constructing a branch of its railroad from Wenatchee in the State of Washington, north along the Columbia River, and is threatening to go upon the strip of land hereinafter described, extending across said Lot Four (4) from the north side to the south side thereof, and to construct a railroad line upon portions of said strip, in the manner hereinafter more fully described and set forth. Defendant denies that it is threatening to trespass upon any land of said complainant, or that its construction of said railway will be without right. Defendant admits that in constructing said railroad line upon said strip, it will make a cut upon said strip, ranging in depth from five (5) to thirty (30) feet. Defendant admits that it threatens to take possession of a right of way upon said strip of land, about 180 feet in width, the limits of which are hereinafter specifically defined and described. To so much of said paragraph as alleges that any cut or trespass will be made by said defendant upon any land of said complainant, this defendant answering, says that it denies said allegations, and each thereof. Defendant admits that the construction of its line of railroad upon said strip, in the manner contemplated by it, and as hereinafter more fully described, will separate the farm of said complainant in two parts, by means of a cut. Defendant admits that the construction of its said railway upon said strip of land will necessitate the removal or destruction of about 200 fruit trees, planted upon said strip of land by said complainant, and alleges that said trees were planted by said complainant upon said strip, without right and without permission

or authority from this defendant. This defendant admits that it will construct said railroad upon a strip of land of the width hereinafter described, and about 1650 feet long across said Lot Four (4), and will interfere with and disturb certain portions of an irrigation system, which said portions of said irrigation system defendant alleges were constructed by said complainant, without right and without the permission or authority of this defendant, unless the same be removed by said complainant, prior to said construction. Defendant denies that it will take a strip of land two hundred (200) feet wide and 1650 feet long, or any land across the farm of said complainant. Said defendant alleges that no proceedings were ever had or taken by said complainant, whereby he, or any person in his behalf, acquired any right, title or interest in and to said strip of land, hereinafter described, upon which said defendant proposes to construct its said railway line.

Further answering this defendant says that it is a railroad corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business and office in the City of St. Paul in said state; that it has filed its articles of incorporation with the Secretary of State of the State of Washington, and has appointed a resident agent therein, all pursuant to the statute in such case made and provided, and is, and at all times herein mentioned has been, duly qualified, and authorized to transact business as a railway company in the State of Washington. That it is organized for the construction of a railway line and railway lines.

That in the year 1906, the Washington and Great Northern Railway Company was a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and in all respects fully authorized to locate and construct lines of railway in said state; that during such year said Washington and Great Northern Railway Company duly surveyed and located a line of railway from Wenatchee northerly, along the west bank of the Columbia River to the mouth of the Okanogan River, and northerly therefrom to the international boundary line, between the United States and the Dominion of Canada. That said line so surveyed and located, crossed Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., in a northerly and southerly direction. That said Lot Four (4) was at the time of said survey and location, and on January 2nd, 1907, the date of the filing of the maps of said location, hereinafter referred to, vacant and unoccupied public land of the United States. That the line so surveyed and located by said Washington and Great Northern Railway Company was duly adopted by resolution of the Board of Directors thereof, as the definite location of said line of railway. That said Washington and Great Northern Railway Company did, prior to the filing of its map of definite location, hereinafter referred to, file in the office of the Secretary of the Interior of the United States, a copy of its articles of incorporation and due proofs of its organization under the same; that on the 2nd day of January, 1907, said Washington and Great Northern Railway Company filed in the Public

Land Office of the United States at Waterville, in the State of Washington, maps showing the definite location of said railway line, as surveyed and located. That the center line of said railway, as surveyed and located across said Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., and as shown upon said map of definite location, is described as follows, to-wit:

Commencing at a point in the south line of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, Willamette Meridian, three hundred thirty-three and two-tenths (333.2) feet east, as measured along said south line of Section Thirteen (13) from the southwest corner of said Section Thirteen (13); thence northeasterly on a two degree (2°) curve to the left, consuming a total angle of two degrees (2°) fifty-two minutes (52′), a distance of one hundred forty-three (143) feet; thence northeasterly on a straight line for a distance of thirty-four hundred eighty-two and eight-tenths (3482.8) feet tangent at its point of beginning to said two degree (2°) curve at its point of ending; said straight line if produced making an included northeasterly angle forty-five degrees (45°) thirty-five minutes (35′) with said south line of said Section Thirteen (13); thence northeasterly on a spiral curve to the left through an angle of nine degrees no minutes (9° 0′) a distance of three hundred (300) feet with a radii varying from infinity at its point of beginning to nine hundred fifty-five and thirty-seven hundredths (955.37) feet at its point of ending and being tangent at its point of beginning to

last described straight line at its point of ending; thence on a six degree (6°) curve to the left through an angle of six degrees (6°) no minutes (0′), a distance of one hundred (100) feet, being tangent at its point of beginning to last described spiral curve at its point of ending; thence on a spiral curve to the left through an angle of nine degrees (9°) no minutes (0′), a distance of three hundred (300) feet with radii varying from nine hundred fifty-five and thirty-seven hundredths (955.37) feet at its point of beginning to infinity at its point of ending; thence northeasterly on a straight line for a distance of three hundred eighty-eight (388) feet, being tangent at its point of beginning to last described spiral curve at its point of ending; thence northeasterly on a spiral curve to the right through an angle of four degrees (4°), a distance of two hundred (200) feet with radii varying from infinity at its point of beginning to fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of ending and being tangent at its point of beginning to last described straight line at its point of ending; thence on a four degree (4°) curve to the right through an angle of thirteen degrees (13°), a distance of three hundred twenty-five (325) feet and being tangent at its point of beginning to last described spiral curve at its point of ending; thence on a spiral curve to the right through an angle of four degrees (4°), a distance of two hundred (200) feet with radii varying from fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of beginning to infinity at its point of ending and being tangent at its point of beginning to last de-

scribed four degree (4°) curve at its point of ending; thence northeasterly on a straight line a distance of three hundred seven (307) feet to a point in the east line of Lot One (1), Section Thirteen (13), Township and Range aforesaid, being also west line of Indian Allotment No. 20, nine hundred fifty-five and one-tenth (955.1) feet distant southerly as measured along east line of Lot One (1) from the northeast corner of said Lot One (1); the aforesaid last course of said center line making a southwesterly angle of thirty-four degrees (34°) thirty minutes (30′), with said east line of said Lot One (1), said center line being shown colored red upon the blue print map, marked "Exhibit A," hereunto annexed, which is hereby referred to and made a part of this answer.

That said maps of definite location were on the 23rd day of March, 1908, duly approved by the Secretary of the Interior of the United States, and were thereupon returned by said Secretary of the Interior to the United States Land Office at Waterville; that the register and receiver of said United States Land Office duly received said maps, and noted upon the maps in said office the said located line of railway of said Washington and Great Northern Railway Company, and said defendant craves leave to refer to said map when produced; that by said proceedings the Washington and Great Northern Railway Company duly acquired a perfect grant, right and title to a strip of land two hundred (200) feet in width across said Lot Four (4), Section Thirteen (13), Township Twenty-eight (28), North of Range Twenty-three (23) East, being one hundred (100) feet

wide on each side of the center line of said railroad, as located across said Lot Four (4), and as hereinbefore described.

That in the month of July, 1907, said Washington and Great Northern Railway Company duly transferred and conveyed to the defendant herein, by its deed in writing, all of its right, title and interest in and to the said right of way and railway line, and that said Great Northern Railway Company then became and has ever since been the owner thereof; that said deed was, on the 9th day of September, 1908, filed for record with the Auditor of Chelan County by said defendant, and on said date was recorded by said Auditor in Book 79 of Deeds at page 444, Records of said county.

That in the years 1908 and 1909 said Great Northern Railway Company, as the owner of said located line and right of way, revised the above mentioned survey and location thereof, and on the 31st day of July, 1909, said Great Northern Railway Company, having theretofore filed with the Secretary of the Interior of the United States a copy of its charter and articles of incorporation and due proofs of its oragnization under the same, filed with the register of the United States Land Office at Waterville, maps of such revision and of amended definite location of said railway line, and said defendant craves leave to refer to said map, when produced. That said located line of railway, as re-surveyed by said Great Northern Railway Company, crossed said Lot Four (4), Section Thirteen (13), Township Twenty-eight (28), North of Range Twenty-three (23) E., W. M., in a northerly and southerly direction; that the

center line of said railway, as revised and re-surveyed across said Lot Four (4) and as shown upon said map of amended definite location, is described as follows, to-wit:

Commencing at a point in the south line of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, Willamette Meridian, two hundred sixty-six and nine-tenths (266.9) feet east as measured along said south line of said Section Thirteen (13) from the southwest corner of said Section Thirteen (13); thence northeasterly on a one degree (1°) curve to the left consuming a total angle of five degrees (5°) forty minutes (40′), a distance of five hundred sixty-six and five-tenths (566.5) feet, tangent to said curve at its intersection with said south line of Section Thirteen (13), making a northeasterly angle of thirty-nine degrees (39°) forty-one minutes (41′) with said south line of Section Thirteen (13); thence northeasterly on a straight line for a distance of three thousand nine and nine-tenths (3009.9) feet, being tangent at its point of beginning to said one degree (1°) curve at its point of ending; thence northeasterly on a spiral curve to the left through a total angle of four degrees (4°) no minutes (0′) a distance of two hundred (200) feet with radii varying from infinity at its point of beginning to fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of ending; thence on a four degree (4°) curve to the left through an angle of sixteen degrees (16°) twenty-four minutes (24′) a distance of four hundred ten (410) feet and being tangent at its point of beginning to last described spiral

at its point of ending; thence on a spiral curve to the left through an angle of four degrees (4°) and no minutes (0′) a distance of two hundred (200) feet with radii varying from fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of beginning to infinity at its point of ending and being tangent at its point of beginning to last described four degree (4°) curve at its point of ending; thence northeasterly on a straight line a distance of three hundred fifty-five (355) feet, being tangent at its point of beginning to last described spiral curve at its point of ending; thence northeasterly on a spiral curve to the right through an angle of four degrees (4°) no minutes (0′), a distance of two hundred (200) feet with radii varying from infinity at its point of beginning to fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of ending and being tangent at its point of beginning to last described straight line at its point of ending; thence on a four degree (4°) no minute (0′) curve to the right through an angle of thirteen degrees (13°) no minutes (0′), a distance of three hundred twenty-five (325) feet and being tangent at its point of beginning to last described spiral curve at its point of ending; thence on a spiral curve to the right through an angle of four degrees (4°) no minutes (0′) a distance of two hundred (200) feet with radii varying from fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of beginning to infinity at its point of ending and being tangent at its point of beginning to last described four degree (4°) no minute (0′) curve at its point of ending; thence northeasterly on a straight line

a distance of three hundred thirty-five and eight-tenths (335.8) feet to a point in the east line of Lot One (1), Section Thirteen (13), Township and Range aforesaid, being also west line of Indian Allotment No. 20 nine hundred thirty-seven and nine-tenths (937.9) feet distant southerly as measured along east line of Lot One (1) from the northeast corner of said Lot One (1); the aforesaid last course of said center line making a southwesterly angle of thirty-four degrees (34°) twenty-six minutes (26′) with said east line of said Lot One (1), said center line being shown colored white upon blue print map, marked "Exhibit A," which is hereunto annexed and hereby referred to and made a part hereof.

That during the month of February, 1912, said Great Northern Railway Company filed in the District Land Office of the United States at Waterville, a release and relinquishment to the United States of all its right, title and interest in and to the right of way acquired by it, as grantee of said Washington and Great Northern Railway Company, as aforesaid, excepting and excluding, however, from said release and relinquishment any and all portions of said right of way situated within one hundred (100) feet on either side of the center line of the railway of said Great Northern Railway Company, as shown upon said map of amended definite location, and as hereinbefore described, which release and relinquishment, by its terms, became effective upon the approval by the Secretary of the Interior of said map of amended definite location of this defendant, Great Northern Railway Company.

That said map of amended definite location, filed by

said Great Northern Railway Company on July 31st, 1909, as aforesaid, was, on the 13th day of July, 1912, duly approved by the Secretary of the Interior of the United States.

That the center line shown on said map of definite location filed by the said Washington and Great Northern Railway Company, is located easterly of the center line shown on said map of amended definite location filed by said Great Northern Railway Company across said Lot Four (4). The maximum distance between said center lines is thirteen and two-tenths (13.2) feet, according to measurements, from the northeast corner of Lot One (1), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., and twenty-three and seven-tenths (23.7) feet, according to measurements from the southwest corner of said Section Thirteen (13), said points being the nearest northerly and southerly, respectively, from said Lot Four (4), to which said center lines are tied on said maps. The relative positions of said center lines are illustrated on said blue print map, hereunto annexed, marked "Exhibit A," which is hereby referred to and made a part of this answer.

That this defendant is, and at all times since the 2nd day of January, 1907, has been, the owner of a strip of land about one hundred and eighty (180) feet in width across Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., ranging from approximately eighty (80) to ninety (90) feet in width, upon the westerly side, and being one hundred (100) feet wide upon the easterly side

of the center line of the Great Northern Railway Company, as shown on its said map of amended definite location, and as hereinbefore described, being all that part of a strip of land one hundred (100) feet wide on each side of the center line shown on map of definite location, filed by the Washington and Great Northern Railway Company on January 2nd, 1907, located and remaining within the lines of a strip one hundred (100) feet wide on each side of the center line shown on the map of amended definite location, filed by the Great Northern Railway Company on July 31, 1909. That the only land in said Lot Four (4) which said defendant proposes to occupy in the construction, maintenance or operation of its railroad across said Lot Four (4) is said strip of land, and that said defendant will, unless restrained by order of this Court, proceed to enter upon said strip and to construct, maintain and operate its line of railway thereon.

VI.

Specifically answering the allegations of Paragraph VI of said bill, this defendant says that it denies that the value of the strip of land which this defendant proposes to occupy, as aforesaid, exceeds the sum of three thousand dollars ($3000), or is of any greater value than seven hundred and fifty dollars ($750.00). Defendant denies that any damage will accrue to said complainant, or to said land, by reason of the construction, maintenance or operation of the defendant's line of railroad upon the strip of land hereinbefore described, which it proposes to occupy across said Lot Four (4)

VII.

Specifically answering the allegations of Paragraph VII of said bill, defendant says that it denies that complainant has no speedy and adequate remedy at law, to relieve from the acts which this defendant threatens to perform.

VIII.

Said defendant further answering said bill alleges that it, the said defendant, is now engaged in the construction of its line of railroad, working from the Okanogan River southerly in the direction of Wenatchee, and has proceeded with the construction of its roadbed up to and within a short distance of the strip of land hereinbefore described; that it has a large force of men at work in excavating, filling and constructing said roadbed, and that it is spending large sums of money in making said road; that any interference with such construction of said defendant will cause said defendant irreparable damage; that the construction of said roadbed across said Lot Four (4), and for more than four (4) miles beyond said Lot Four (4) is of such a nature that a steam shovel is necessary to be used in excavating, filling and making said roadbed; that it will be necessary for said defendant within two weeks from the date hereof, to enter upon said strip of land with said steam shovel, and to proceed with the construction of said railway, and that it cannot proceed with said work of construction beyond said Lot Four (4), until it has completed the construction of said roadbed across the strip of land hereinbefore described on said Lot Four (4); that the said defendant is endeavoring with all

haste to complete said roadbed, and to construct thereon the said line of railway of said defendant, so that the same will be constructed and in readiness to serve the territory contiguous and lying adjacent to said line of railway; that the cost of the operation of said steam shovel and the wages of the men used in operating the same and in connection therewith, and the other expenses of constructing said roadbed, amount to the sum of three hundred dollars ($300.00) per day, and that if the said work of construction is delayed by the issuance of an injunction herein, damage will be done to said defendant in the sum of two hundred and fifty dollars ($250.00) per day. That not only will said damage accrue to said defendant, but that much damage will be done to the community which said defendant proposes to serve with its said railroad, and to the territory contiguous to said line of railroad; that the country which will be served by said line of railroad has at present no railroad transportation facilities and no adequate transportation facilities of any kind, and said defendant alleges that the public has an interest in the speedy construction of said railway, and that the said defendant should not be impeded in said construction across said strip of land, hereinbefore described, by any act of said complainant, or any preliminary or permanent injunction granted herein.

IX.

This defendant hereby offers to file herein, a bond with good and sufficient sureties, to be approved by this Court, conditioned that it will indemnify and reimburse said complainant for any and all damages which may

accrue to said complainant, by reason of the construction by said defendant of its line of railroad upon the said strip of land, hereinbefore described, in case it shall be finally adjudged that said construction is wrongful, and with such other conditions as the above entitled Court may consider requisite and necessary to protect said complainant from any damages which may accrue to him, by reason of the construction of said railroad upon said strip of land.

X.

This defendant denies any and all manner of unlawful acts, wherein it is by the said bill of complaint charged, without this, that there is any other matter, cause or thing in said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is willing and ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GREAT NORTHERN RAILWAY COMPANY,
By F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Its Solicitors.

F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Solicitors for Defendant.

accrue to said complainant, by reason of the construction by said defendant of its line of railroad upon the said strip of land, hereinbefore described, in case it shall be finally adjudged that said construction is wrongful, and with such other conditions as the above entitled Court may consider requisite and necessary to protect said complainant from any damages which may accrue to him, by reason of the construction of said railroad upon said strip of land.

X.

This defendant denies any and all manner of unlawful acts, wherein it is by the said bill of complaint charged, without this, that there is any other matter, cause or thing in said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is willing and ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GREAT NORTHERN RAILWAY COMPANY,
By F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Its Solicitors.

F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Solicitors for Defendant.

D O

OLD O

P. O. Address: Great Northern Passenger Station, Spokane, Spokane County, Washington.

Indorsed: Answer.

Filed in the U. S. District Court, Eastern District of Washington, Dec. 19, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

GEORGE M. TAGGART,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

It is hereby stipulated, that the answer of the defendant to the bill of complaint herein need not be verified, and answer under oath is hereby expressly waived, as is also the attestation of the answer of said defendant by affixing the corporate seal of said defendant to said answer, and the attestation of the signature of the said defendant is also waived.

Dated this 13th day of December, 1912.

FRANCE & HELSELL,
Solicitors for Complainant.
F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Solicitors for Defendant.

Indorsed: Stipulation.

Filed in the U. S. District Court, Eastern Dist. of Washington, Dec. 19, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

In the United States District Court, for the Eastern District of Washington, Northern Division.

No. .....

GEORGE M. TAGGART,

Complainant,

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

STIPULATION FOR SUBMISSION OF CAUSE UPON AGREED STATEMENT OF FACTS.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, by their respective solicitors, that the application of the complainant for a temporary injunction may be submitted to the above entitled Court upon the following facts, which are hereby admitted and agreed to be true:

I.

That complainant is a citizen and resident of the State of Washington, residing in Chelan County in said state, and the defendant is a corporation organized and existing under the laws of the State of Minnesota, having its principal place of business at St. Paul in said state, and a citizen and inhabitant of said State of Minnesota.

II.

That complainant, on or about September 17, 1907, filed in the United States Land Office at Waterville, Washington, his homestead entry upon

Lot Four (4) and the Southeast Quarter of the Northwest Quarter of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, W. M., in Chelan County, Washington.

That on said date said homestead entry was by the officials of said local Land Office duly allowed; that thereupon complainant entered and resided upon said land, and improved a portion of said Lot Four by the cultivation of the soil, by the erection of farm buildings, by the planting of seventeen acres of fruit trees, and the installation of a pumping system for irrigation purposes.

III.

That thereafter, and on February 3, 1912, the United States issued to said complainant a patent describing all of said land, and making no reservation of any railroad right of way thereon.

IV.

That complainant has, ever since the 17th day of September, 1907, been in possession of said land, and has improved the same in the manner above set forth.

V.

That defendant is, and at all times herein mentioned has been, a railway corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business and office at the City of St. Paul in said state;

that it has filed its articles of incorporation with the Secretary of State of the State of Washington, and has appointed a resident agent therein, all pursuant to the statute in such case made and provided, and is, and at all times herein mentioned has been, duly qualified and authorized to transact business as a railway company in the State of Washington.

VI.

That in the year 1906 the Washington and Great Northern Railway Company was a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and was in all respects fully authorized to locate and construct lines of railway in said state; that during such year said Washington and Great Northern Railway Company duly surveyed and located a line of railway from Wenatchee northerly along the west bank of the Columbia River, to the mouth of the Okanogan River, and northerly therefrom to the international boundary line between the United States and the Dominion of Canada. That said line, so surveyed and located, crossed Lot 4, Section 13, Township 28, North of Range 23 E., W. M., in a northerly and southerly direction. That said Lot 4 was, at the time of said survey and location, and on January 2, 1907, the date of the filing of the maps of said location hereinafter referred to, vacant and unoccupied public lands of the United States. That the line so surveyed and located by said Washington and Great Northern Railway Company was duly adopted by resolution of the Board of Directors thereof, as the definite location of said line of railway; that said Washington & Great

Northern Railway Company did, prior to the filing of its map of definite location, hereinafter referred to, file in the office of the Secretary of the Interior of the United States, a copy of its articles of incorporation, and due proofs of its organization under the same; that on the 2nd day of January, 1907, said Washington & Great Northern Railway Company filed in the Public Land Office of the United States at Waterville, in the State of Washington, maps showing the definite location of said railway line as surveyed and located. The section of said map crossing said Lot 4, Section 13, Township 28 N., R. 23 E., W. M., is hereunto annexed, marked "Exhibit A," and is hereby referred to and made a part of this stipulation.

VII.

That said maps of definite location were, on the 23d day of March, 1908, duly approved by the Secretary of the Interior of the United States, in the form endorsed upon said Exhibit A, and were thereupon returned by said Secretary of the Interior to the United States Land Office at Waterville; that the register and receiver of said United States Land Office duly received said maps and noted upon the plats in said office the said located line of railway of said Washington & Great Northern Railway Company.

VIII.

That in the month of July, 1907, said Washington & Great Northern Railway Company duly transferred and conveyed to the defendant herein, by its deed in writing, all of its right, title and interest in and to the said right of way and railway line, and that said Great Northern Railway Company then became, and has ever since been

the owner thereof. That said deed was, on the 9th day of September, 1908, filed for record with the Auditor of Chelan County by said defendant, and on said date was recorded by said auditor in Book 79 of Deeds, at page 444, Records of said county.

IX.

That in the years 1908 and 1909, said Great Northern Railway Company, as the owner of said located line and right of way, revised the above mentioned survey and location thereof, and on the 31st day of July, 1909, said Great Northern Railway Company, having theretofore filed with the Secretary of the Interior of the United States, a copy of its charter and articles of incorporation, and due proofs of its organization under the same, filed with the Register of the United States Land Office at Waterville, maps of such revision and of amended definite location of said railway line. A copy of the section of said map crossing said Lot 4 is hereunto annexed, marked "Exhibit B," and is hereby referred to and made a part of this stipulation.

X.

That on January 12, 1912, the Commissioner of the United States General Land Office directed the Register and Receiver of the local Land Office at Waterville, to call the attention of said Great Northern Railway Company to the fact that said company had not filed, with its said map of amended definite location, a relinquishment, under seal, of all rights under the original approval of said map filed by said Washington & Great Northern Railway Company, as aforesaid, as to the portions thereof amended in said Great Northern Railway

Company's map of amended definite location, as provided in Section 19 of the circular of said General Land Office issued on May 21, 1909, reading as follows:

"When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior."

XI.

That during the month of February, 1912, said Great Northern Railway Company filed in the District Land Office of the United States at Waterville, a release and relinquishment to the United States, of all its right, title and interest in and to the right of way acquired by it, as grantee of said Washington & Great Northern Railway Company as aforesaid, with certain exceptions, a copy of which relinquishment is hereunto annexed, marked "Exhibit C," and hereby referred to and made a part of this stipulation.

XII.

That said map of amended definite location, filed by said Great Northern Railway Company on July 31, 1909, as aforesaid, was, on the 13th day of July, 1912, duly approved by the Secretary of the Interior of the United States.

XIII.

That said Washington & Great Northern Railway Company was never called upon or requested by said Secretary of the Interior, or by the Register or Receiver of the United States Land Office at Waterville, to file any profile showing the elevations and depressions at which its said line of railway described in said map of definite location, filed by it on January 2, 1907, as aforesaid, crossed the public lands of the United States shown thereon, and that said defendant Great Northern Railway Company was never called upon or requested by the Secretary of the Interior, or by such register or receiver, to file any profile showing the elevations and depressions at which its said line of railway shown on said map of amended definite location, crossed the public lands of the United States shown thereon, until the 17th day of November, 1910, when the Secretary of the Interior requested the Register and Receiver of the Land Office at Waterville to notify said defendant, that, since the line of its railway as described in said map of amended definite location crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry or sale, said Great Northern Railway Company would be required to file a profile showing the elevations and depressions at which the line of its said

railway crossed such lands; that on May 4, 1911, said defendant filed a profile in the United States Land Office at Waterville, showing the elevations and depressions of its entire line, from its crossing of the Okanogan River to its junction with the main line of said defendant near Wenatchee. That said defendant has never filed any other maps with reference to said right of way across said Lot 4, than those referred to in this stipulation.

XIV.

That at all times since November 4, 1898, the regulations promulgated by the General Land Office of the United States, and approved by the Secretary of the Interior, under the Act of Congress approved March 3, 1875, entitled, "An act granting to railroads the right of way through the public lands of the United States," have contained the following provisions:

"The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of the station grounds."

XV.

That the center line shown on said map of definite location, filed by the Washington & Great Northern Railway Company is located easterly of the center line

shown on said map of amended definite location filed by said Great Northern Railway Company across said Lot 4. The maximum distance between said center lines is 13.2 feet, according to measurements from the Northeast corner of Lot 1, Section 13, Township 28 N., R. 23 E., W. M., and 23.7 feet according to measurements from the Southwest corner of said Section 13, said points being the nearest, northerly and southerly, respectively, from said Lot 4, to which said center lines are tied on said maps. The relative positions of said center lines are illustrated on the blue print map hereunto annexed, marked "Exhibit D," which is hereby referred to and made a part of this stipulation.

XVI.

That the only land in said Lot 4 which said defendant proposes to occupy in the construction, maintenance or operation of its railroad across said Lot 4, is a strip of land about 180 feet in width, being all that part of a strip of land 100 feet wide on each side of the center line shown in the map of definite location filed January 2, 1907, located and remaining within the lines of a strip 100 feet wide on each side of the center line shown on the map of amended definite location filed July 31, 1909. That said defendant will, unless restrained by the order of this Court, proceed to enter upon said strip, and to construct, maintain and operate its line of railway thereon.

XVII.

That no part of the twenty-mile section of defendant's railroad crossing said Lot 4, has been completed.

XVIII.

That said defendant is now engaged in the construction of its line of railroad, working from the Okanogan River in the direction of Wenatchee, and has proceeded with the construction of its roadbed up to and within a short distance of the strip of land hereinbefore described. That the construction of said railroad upon said strip of land will necessitate the removal or destruction of about 225 fruit trees planted upon said strip by said complainant, and will require the readjustment of certain portions of an irrigation system constructed by said complainant upon said land. That plaintiff's claim that said acts of defendant complained of in this action will result in damage to him exceeding $3,000.00 is made in good faith. That the facts constituting what defendant believes to be its equities opposed to the issuing of a temporary injunction herein may be presented by affidavits upon the hearing of the application for a temporary injunction.

XIX.

If the order of the Court upon the application for temporary injunction shall be in favor of defendant, it is agreed that evidence may be introduced to enable the Court in its order to define and describe, by metes and bounds, the land which defendant is entitled to occupy with its said railroad across said Lot 4.

All objections to the competency, relevancy or materiality of any fact hereinbefore admitted, are reserved. Complainant reserves the right upon reasonable notice

to file affidavits not inconsistent with this stipulation.

Dated, this 13th day of December, 1912.

FRANCE & HELSELL,
Solicitors for Complainant.

F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Solicitors for Defendant.

Indorsed: Stipulation.

Filed in the U. S. District Court, Eastern District of Washington, Dec. 21, 1912.

WM. H. HARE, Clerk.
By FRANK C. NASH, Deputy.

EXHIBIT "C".

F 279784
B.
W. E. L. 4-207

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C.
November 22, 1912.

I hereby certify that the annexed copy of relinquishment is a true and literal exemplification from the original paper on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

S. V. PROUDFIT,
(SEAL) Acting Commissioner of the General Land Office.

FILED 010100
Feb. 19, 1912. 010101
W. F. HAYNES, Register. 010102
010103

WHEREAS, the Secretary of the Interior, on the 23rd day of March, 1908, approved, under and pursuant to the provisions of the Act of Congress of March 3rd, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States," maps showing the line of railway of the Washington and Great Northern Railway Company from a point in the middle of the Okanogan River in Section Five (5), Township Thirty-one (31) North, Range Twenty-five (25) East of the Willamette Meridian, thence along the Columbia River to a junction with the Great Northern Railway Company's constructed line of railway in the Southeast Quarter (SE ¼) of Section Twenty-eight (28), Township Twenty-three (23) North, Range Twenty (20) East, near the mouth of the Wenatchee River, in the State of Washington, and

WHEREAS, the Great Northern Railway Company, grantee of the Washington and Great Northern Railway Company, revised and relocated the said line of railway, the maps whereof were approved as aforesaid, and on the 31st day of July, 1909, filed in the United States District Land Office at Waterville, Washington, for the approval of the Secretary of the Interior, under the Act aforesaid, maps of said revised and relocated line, and

WHEREAS, the Secretary of the Interior, as a condition precedent to the approval under the Act afore-

said of the maps of said revised and relocated line requires the Great Northern Railway Company to release and relinquish to the United States the right of way pertaining to the line of original location shown on the maps approved by him on the 23rd day of March, 1908, as aforesaid.

NOW THEREFORE, the Great Northern Railway Company, in consideration of the premises, does hereby release and relinquish to the United States all its right, title and interest in and to the right of way pertaining to the line of railway between the points aforesaid shown upon the maps filed by the Washington and Great Northern Railway Company and approved by the Secretary of the Interior on the 23rd day of March, 1908, as aforesaid, acquired under and by virtue of said approval, excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of said Company's railway shown upon the maps thereof filed in the United States District Land Office at Waterville, Washington, on the 31st day of July, 1909.

It is expressly understood that this release and relinquishment shall not take effect until the maps of the said railway company's revised and relocated line are approved by the Secretary of the Interior.

IN WITNESS WHEREOF, the Great Northern Railway Company has caused this instrument to be exe-

cuted by its proper officers, and its corporate seal to be hereunto affixed this 6th day of February, 1912.

GREAT NORTHERN RAILWAY COMPANY,

(SEAL) By L. W. HILL, President.

L. E. KATZENBACH, Secretary.

Signed, sealed and delivered in presence of:

H. H. PARKHANE,

VINCENT C. JENNY.

State of Minnesota,

County of Ramsey,—ss.

On this 10th day of February, A. D., 1912, before me personally appeared L. W. Hill, to me known to be the ..... president of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein named, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

EARLE W. McELROY,

(SEAL) Notary Public, Ramsey County, Minn.

My Commission expires April 14, 1918.

Endorsements: Exhibit "C".

Filed in the U. S. District Court for the Eastern District of Washington, December 21, 1912.

W. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. .....

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that those maps described in the stipulation of facts heretofore entered into on the 13th day of December, 1912, in the above entitled action, described as Exhibits "A", "B", "C" and "D", may be introduced in evidence at the hearing upon an application for a preliminary injunction as Exhibits. bearing such numbers and need not be attached to said stipulation as therein stated.

FRANCE & HELSELL,
F. V. BROWN,
CHARLES S. ALBERT and
THOMAS BALMER.

Indorsed: Stipulation.

Filed in the U. S. District Court, Eastern District of Washington, Dec. 21, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. .....

GEORGE M. TAGGART,

Complainant,

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

AFFIDAVIT OF A. M. ANDERSON.

State of Washington,
County of Spokane,—ss.

A. M. ANDERSON, being first duly sworn, deposes and says: That he is, and for eight years last past, has been the right of way agent of the Great Northern Railway Company at Spokane, Washington. That as such right of way agent he has purchased for said railway company the greater portion of the right of way necessary for its line of railroad from Wenatchee north to Pateros. That he is acquainted with the location, characteristics and value of Lot 4, Section 13, Township 28 N., R. 23 E., W. M., that he has purchased numerous parcels of land in the vicinity of said Lot 4, and is familiar with the market value of real estate of the character of said Lot 4 in that vicinity. That the fair market value of a strip of land across said Lot 4, 100 feet in width on each side of the center line of the Great Northern Railway Company, including the improvements thereon, and all damages to the remainder of said Lot 4, by reason of the construction of a railroad thereon in

the manner contemplated by said defendant, does not exceed the sum of $1,000.00.

A. M. ANDERSON.

Subscribed and sworn to before me this 17th day of December, 1912.

THOMAS BALMER,
Notary Public in and for the State of Wash-
(Seal.) ington, residing at Spokane.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

GEORGE M. TAGGART,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

AFFIDAVIT OF M. J. C. ANDREWS.

State of Washington,
County of Spokane,—ss.

M. J. C. ANDREWS, being first duly sworn, on oath deposes and says that he is, and for about four years last past has been employed by the Great Northern Railway Company as engineer in charge of the construction of its line of railroad from Wenatchee, northerly along the west bank of the Columbia River to Pateros, in Okanogan County. That he is familiar with all the details of said construction, and the amount of work done and required to be done by said defendant in building its said railroad line.

That the defendant, Great Northern Railway Company, is now engaged in constructing its said line of railway, working from Pateros near the Methow River, in the direction of Wenatchee in Chelan County, at the junction of said line with the main line of said defendant, Great Northern Railway Company. That said railroad line is built through an uneven and hilly country, following the west bank of the Columbia River, and at places is located upon the sides of precipitous hills and rocky cliffs. That the construction of said railroad line is of such a heavy nature, that a steam shovel and construction trains with dump cars are necessary in the building of said roadbed. That said steam shovel and construction trains are now working about two miles north of Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., portions of which constitute the farm of the complainant herein, George M. Taggart. That said steam shovel will reach the north boundary of said Lot Four (4) in about three weeks. That said railroad across the greater portion of the northerly one-half of said Lot Four (4) is to be constructed on a fill of varying heights, and that across the southerly one-half of said lot, said railroad will be constructed in a cut of varying depths, gradually increasing in depth from one foot, at a point near the center of said Lot Four (4), to twenty (20) feet in depth at the southerly boundary thereof. That before said steam shovel can be located at any point on said Lot Four (4), where cutting is necessary, a trestle must be constructed over the places which will later be filled, for the purpose of carrying

said construction train with material from points north of said Lot Four (4) to be dumped between the supports of said trestle, so that the same may be sufficiently strengthened to carry said steam shovel to the point on said Lot Four (4), where it will be located for the purpose of making said cut. That after the construction and strengthening of said trestle, as aforesaid, said steam shovel will be moved and located at the point on said Lot Four (4), where the cutting begins. That the material taken from said cut upon the southerly portion of said Lot Four (4) will then be taken in the cars of said construction train and dumped along said trestle, to widen said fill to the width necessary to support a standard gauge railroad.

That beyond the southerly boundary of said lot, there are about four miles of steam shovel work to be done. in a method similar to that above described, and that if said defendant is not permitted to construct its railroad across said Lot Four (4) it will either have to move said steam shovel around said Lot Four (4), to a point about four miles below the southerly boundary thereof, and commence working northerly from said point in the direction of said Lot Four (4), or said defendant will be obliged to tie up said steam shovel and construction train, and release all the men now in its construction gang.

That to move said steam shovel and construction train beyond said Lot Four (4), a track would have to be constructed, upon a reasonable grade, from a point near the northerly boundary of said Lot Four (4), down to the bank of the Columbia River. That after grading and

construction of said track, said steam shovel and construction train would have to be moved over the same down to the bank of the Columbia River, and there loaded upon a barge and towed upon said barge to a point about four miles below the southerly boundary of said Lot Four (4). That said outfit would then have to be unloaded from said barge and a track constructed from said point on the bank of the Columbia River, upon a reasonable and practicable grade, up to a point upon the located line of said railroad where it could commence the cutting and construction of said roadbed, northerly in the direction of said Lot Four (4). That all the territory upon which said tracks would have to be constructed, as aforesaid, is rocky and mountainous, and that the cost of moving said steam shovel, in the manner above outlined, would amount to approximately eight thousand dollars ($8000.00).

That said cost is so great as to make the moving of said steam shovel and outfit impracticable, and the same would have to be tied up, if not allowed to go upon said Lot Four (4).

That the daily wages of the men engaged in operating said steam shovel and outfit, are about one hundred and seventy-five dollars ($175.00), and that the daily cost of feeding said men amounts to about fifty dollars ($50.00). That if said steam shovel and outfit were tied up, all of said crew would either have to be discharged, or retained at the expense above mentioned. That if said crew were discharged, it would take about two weeks to re-assemble sufficient men to operate said steam shovel and construction train. That the fair

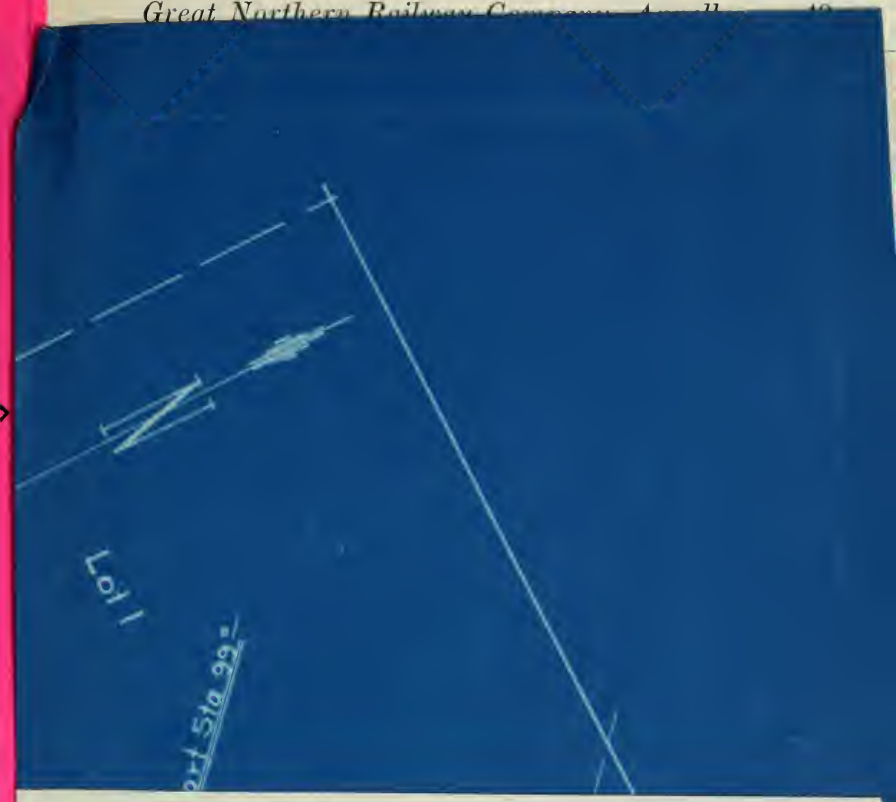
rental value of a steam shovel and construction train of the character used by said defendant in said work of grading and building said roadbed, and the fair and reasonable value of the use of such steam shovel and construction train is approximately one hundred dollars ($100) per day, and that if the said outfit were tied up, the daily loss to said defendant, on account of its inability to use said steam shovel and construction train. would be approximately one hundred dollars ($100) per day.

That said defendant, Great Northern Railway Company, is proceeding with all possible haste to complete the grading and construction of said railroad line before the end of May, 1913, so that the tracks thereof may be laid and said railroad line in operation, for the purpose of moving the fruit and products of the residents of the surrounding country, in the fall of 1913, and that to that end said defendant is now engaged in grading said railroad line at many different points along the same, using ten steam shovels and a corresponding number of construction trains.

That the width of the strip which will be occupied by said defendant in the construction and operation of its said railroad line across said Lot Four (4), including all embankments and cuts, is shown upon the blue print map hereunto annexed. That said strip is not wider than one hundred (100) feet at any point upon the easterly side of the Great Northern Railway Company's center line, nor more than seventy-five (75) feet in width at any point upon the westerly side of said center line.

Further affiant saith not.

M. J. C. ANDREWS.


Lot 1

rental value of a steam shovel and construction train of the character used by said defendant in said work of grading and building said roadbed, and the fair and reasonable value of the use of such steam shovel and construction train is approximately one hundred dollars ($100) per day, and that if the said outfit were tied up, the daily loss to said defendant, on account of its inability to use said steam shovel and construction train, would be approximately one hundred dollars ($100) per day.

That said defendant, Great Northern Railway Company, is proceeding with all possible haste to complete the grading and construction of said railroad line before the end of May, 1913, so that the tracks thereof may be laid and said railroad line in operation, for the purpose of moving the fruit and products of the residents of the surrounding country, in the fall of 1913, and that to that end said defendant is now engaged in grading said railroad line at many different points along the same, using ten steam shovels and a corresponding number of construction trains.

That the width of the strip which will be occupied by said defendant in the construction and operation of its said railroad line across said Lot Four (4), including all embankments and cuts, is shown upon the blue print map hereunto annexed. That said strip is not wider than one hundred (100) feet at any point upon the easterly side of the Great Northern Railway Company's center line, nor more than seventy-five (75) feet in width at any point upon the westerly side of said center line.

Further affiant saith not.

M. J. C. ANDREWS.

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M. J. C. ANDREWS.

Subscribed and sworn to before me this 17th day of December, 1912.

THOMAS BALMER,
Notary Public in and for the State of Washington, residing at Spokane.

Indorsed: Affidavits of M. J. C. Andrews and A. M. Anderson.

Filed in the U. S. District Court, Eastern District of Washington, Dec. 21, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Due service of the within affidavits by a true copy thereof is hereby admitted at Seattle, Washington, this 18th day of December, A. D. 1912.

FRANCE & HELSELL,
Attorneys for Complainant.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE H. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

OPINION.

FRANCE & HELSELL, for Complainant.

F. V. BROWN, CHARLES S. ALBERT and THOMAS BALMER, for Defendant.

RUDKIN, District Judge. This is a controversy between a railway company and a settler over a right of way through certain lands which were heretofore public lands of the United States. The railway company claims its right of way under the Act of Congress of March 3, 1875 (18 Stat. L., p. 482, c. 152), sections one and four of which read as follows:

Sec. 1. "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station to each ten miles of road. * * *"

Sec. 4. "That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey

thereof by the United States, file with the register of the land office in the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; *provided,* that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.''

The complainant, on the other hand, claims title under a patent from the United States, issued pursuant to the homestead laws. The case has been submitted to the Court on the application for a temporary restraining order and for a final decree upon the merits upon an agreed statement of facts. Omitting jurisdictional and other facts not deemed material the agreed case is this:

During the year 1906 The Washington & Great Northern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and authorized to locate and construct lines of railroad within the state, surveyed and located a line of railway from Wenatchee in a northerly direction along the west bank of the Columbia river to the mouth of the Okanogan River, and thence northerly to the international boundary line between the United States and the Dominion of Canada. The line of road as thus surveyed and located crossed Lot 4 of Section 13, Township 28, North of Range 23 E., W. M., in a northerly and southerly direction. The lot thus de-

scribed is the lot in controversy here, and was at that time unoccupied public land of the United States and so remained until the 17th day of September, 1907. The line of road as thus surveyed and located by The Washington and Great Northern Railway Company was adopted by resolution of its Board of Directors as the definite location of its line of railway, and the railway company, having filed with the Secretary of the Interior of the United States a copy of its articles of incorporation, and due proofs of its organization under the same, on the second day of January, 1907, filed in the United States Land Office at Waterville, Washington, maps showing the definite location of its line of railway as surveyed and located through the public lands of the United States, a copy of which maps is attached to the agreed statement. The maps thus filed were duly approved by the Secretary of the Interior on the 23rd day of March, 1908, and were returned to the local land office where the proper notations were made upon the plats, showing the located line across the public lands of the United States. In the month of July, 1907, The Washington & Great Northern Railway Company conveyed to the defendant, The Great Northern Railway Company, all its right, title and interest in and to the right of way thus located and acquired, and The Great Northern Railway Company has since been and is now the owner of the same. The Great Northern Railway Company filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, and during the years 1908 and 1909 revised the survey and location of the road as

theretofore made by its predecessor in interest, and on the 31st day of July, 1909, filed with the register and receiver of the United States Land Office at Waterville maps of such revision and of such amended definite location. A copy of this amended map is attached to the agreed statement and made a part thereof. The difference between the central line of the road as shown on the original maps and the central line of the road as shown on the amended map does not exceed twenty feet at any point where the lines cross Lot Four, but at other places the variation is as much as two hundred feet. On the twelfth day of January, 1912, the local land office at Waterville, Washington, by direction of the commissioner of the general land office, called the attention of The Great Northern Railway Company to the fact that its amended map of definite location was not accompanied by a relinquishment under seal of all rights under the original approval of the maps filed by The Washington & Great Northern Railway Company as to the portions thereof amended by the map filed by The Great Northern Railway Company, as required by section nineteen of the circular of the general land office, issued on May 21, 1909, which reads as follows:

"When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the general land office. No new map will be required except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree

with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such case the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior."

Thereafter, on the sixth day of February, 1912, The Great Northern Railway Company released and relinquished to the United States all its right, title and interest in and to the right of way pertaining to the line of railway as shown upon the maps filed by its predecessor and approved by the Secretary of the Interior, "excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of such company's railway shown upon the maps thereof filed in the United States District Land Office at Waterville, Washington, on the 31st day of July, 1909."

The relinquishment expressly provided that it should not take effect until the revised and amended map of definite location was approved by the Secretary of the Interior. The amended map thus filed was formally approved by the Secretary on the 13th day of July, 1912. Neither The Great Northern Railway Company nor its predecessor in interest filed a profile showing the elevations and grades of the proposed roads across the public lands of the United States and was never re-

quested so to do until the 17th day of November, 1910. On the latter date the register and receiver of the land office at Waterville, by direction of the Secretary of the Interior, notified the defendant that since the line of its railway as described in the map of amended definite location, crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry and sale, the company would be required to file a profile showing the elevations and depressions at which the line of railway crossed such lands, and on the 4th day of May, 1911, pursuant to this request, the company did file a profile in the United States Land Office at Waterville, showing the elevations and depressions of its entire line from the crossing of the Okanogan River to the junction with the main line near Wenatchee. It is further stipulated that at all times since the fourth day of November, 1898, the regulations promulgated by the General Land Office of the United States, and approved by the Secretary of the Interior, under the Act of Congress of March 3, 1875, *supra,* contained the following:

"The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station houses are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of station grounds."

Such is the claim of the railroad company.

The complainant on the other hand made entry of Lot Four, above described, together with other land, on the seventeenth day of September, 1907, under the homestead laws of the United States, and received patent therefor on the thirteenth day of February, 1912, after a full compliance with the homestead laws. The patent made no reservation of any railroad right of way.

The railroad company is now about to enter upon the strip of land one hundred and eighty feet in width, included in both the original and amended maps of definite location across Lot Four, and the complainant instituted this suit to restrain it from so doing. It will be seen from the foregoing statement that the railway company is at least first in point of time, but the complainant claims that his rights are superior to those of the company for two reasons. First. Because of the failure of the railroad company to file a *profile* of its road with the register of the land office as required by law; and, second, because any rights acquired under the original location were forfeited or abandoned by filing the map of amended location.

I am not convinced that either of these contentions is sound. Technically speaking, the term "profile" means, "a side or sectional elevation;" "a drawing showing a vertical section of the ground along a surveyed line or graded work," but it also means, "an outline or contour;" and the term, "outline" means, "the line which marks the outer limits of an object or figure; an exterior line or edge; contour."

Webster's International Dictionary, Titles, Profile and Outline.

It is very evident that Congress intended something more than a mere side or sectional elevation of the railroad, for such a map or profile would convey little or no information to either the government or prospective settlers. It would not show the location of the railroad upon the ground or describe the lands taken, and could in no event show the station houses. Furthermore, for a period of nearly forty years the Secretary of the Interior, who is charged with the administration of this law, has construed the term "profile" to mean a map of definite location, or a map of alignment.

Circular of January 13, 1888 (12 L. D., 423).

Circular of November 4, 1898 (27 L. D., 663).

This construction of the law by the officer charged with its administration has been acquiesced in by all departments of the government for so long a period that it should now be accepted by the courts.

United States v. Burlington R. Co., 98 U. S., 334.

Jewitt v. Shultz, 180 U. S., 139.

In the recent case of United States v. Minidoka & S. W. R. Co., cited by the complainant from the Circuit Court of Appeals for this circuit (190 Fed., 491), the Court, in the course of its opinion, said:

"The defendant railroad in this case filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same, but has filed no profile map of its road with the register of the land office where the land is located, and no such profile map has been filed with or approved by the Secretary of the Interior."

I take it from this that no map of any kind was filed

in that case, and that the Court did not have before it the validity or sufficiency of the regulations promulgated by the Secretary of the Interior or of a map filed in compliance therewith. If it had, I doubt very much whether it would have declared invalid regulations and maps, the validity of which have been recognized and acquiesced in for so long a period, for later in its opinion the Court referred to the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands and said:

"All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road; * * *."

And:

"We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map."

Again, in the recent case of Stalker v. Oregon Short Line, 225 U. S., 142, the Supreme Court uses indiscriminately such expressions as, "map of location;" "map showing the termini of such portion and its route over the public lands;" "map of alignment," etc.

For these reasons I am of opinion that the profile or map filed with the Secretary of the Interior by the predecessor in interest of the present defendant was sufficient in law and vested title to the right of way in the defendant company. And if title vested in the defendant company upon the approval of the map by the Sec-

retary of the Interior, and if that approval related back to the time of filing the original map of alignment (Stalker v. Oregon Short Line, *supra*) the title thus acquired could only be divested in one of two ways; first, but a forfeiture declared by the government for breach of conditions; and, second, by the voluntary act of the company itself. No forfeiture has been declared by the government and the act of the company in making so slight a change in its located line should not be construed as a waiver or forfeiture of pre-existing rights contrary to the expressed intentions of both the government and its grantee. In demanding the relinquishment the Secretary of the Interior recognized the fact that title had already vested in the company, and he required only a relinquishment of the over-lap outside the exterior limits of the two located lines. In so doing, he, in my opinion, acted within his authority. The defendant is therefore claiming only what the Congress has granted to it and what the Congress has a right to grant, and if so, the complainant has no just ground for complaint. The temporary injunction must therefore be denied and the bill dismissed, and it is so ordered. Let judgment be entered accordingly.

Indorsed: Opinion.

Filed in the U. S. District Court, Eastern District of Washington, Dec. 31, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

GEORGE M. TAGGART, Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, Defendant.

IN EQUITY.

DECREE.

The application of the complainant above named for a temporary injunction in the above entitled cause having come on regularly for hearing before the Hon. Frank H. Rudkin, Judge of the above entitled Court, on the 20th day of December, 1912, at this term, the complainant appearing by his solicitor, Frank P. Helsell, and the defendant appearing by its solicitors, F. V. Brown, Charles S. Albert and Thomas Balmer; and said application of the complainant for a temporary injunction and the prayer of the complainant for a final decree herein, having by stipulation of the solicitors for the respective parties hereto, been submitted upon an agreed statement of facts, filed herein, and the affidavits of M. J. C. Andrews and A. M. Anderson, filed herein by the defendant, and said cause having been fully argued by counsel and fully considered by the Court, and said Court now being advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED, that said application of the complainant for a temporary injunction, be, and the same is hereby denied, and that the bill of complaint of the complainant herein, be, and the same is hereby dismissed, and that said de-

fendant have and recover of the complainant its costs and disbursements, taxed at .....

Done in open Court this 21st day of January, 1913.

FRANK H. RUDKIN,
Judge.

Indorsed: Decree.

Filed in the U. S. District Court, Eastern District of Washington, Jan. 22, 1913.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART, Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, Defendant.

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND ORDER ALLOWING THE SAME.

To the Honorable District Court of the United States for the Eastern District of Washington:

The above named complainant, George M. Taggart, feeling himself aggrieved by the decree made and entered by said Court on the 22nd day of January, 1913, in the above entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the

Assignment of Errors filed herein, and prays that this appeal may be allowed and that citation issue, as provided by law, to the respondent herein upon said appeal, and that a transcript of the record, proceedings and papers on which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

Dated this 16th day of July, A. D. 1913.

FRANCE & HELSELL,
Solicitors for Complainant.

The foregoing petition is granted, and said appeal is allowed upon complainant's giving a bond conditioned as required by law in the sum of two hundred and fifty dollars.

Dated this 17th day of July, A. D. 1913.

FRANK H. RUDKIN,
United States District Judge.

Indorsed: Petition for Appeal and Order allowing the same.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Copy of within petition for appeal and order allowing same received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,
Solicitor for Defendant.

United States District Court, for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

ASSIGNMENT OF ERRORS.

Now on the 16th day of July, 1913, came the complainant by his solicitors, Messrs. France & Helsell, and says that the decree entered in the above cause on the 22nd day of January, 1913, is erroneous and unjust to the complainant.

First: Because it decrees that the bill of complaint be dismissed.

Second: Because the decree operates to give the defendant a right of way over and across the lands of complainant, described in the bill of complaint, without compensating complainant in any manner for said right of way.

Third: Because said decree gives to the defendant a right of way over and across the lands of complainant, described in the bill of complaint, which is prior and superior to any right of the complainant in and to the land affected by the right of way.

Fourth: Because defendant has never complied with the Act of Congress of March 3, 1875, under which defendant claims to own a right of way over and across the lands of complainant.

Fifth: Because defendant did not comply with the requirements of the Act of March 3, 1875, prior to the acquisition by the complainant of his right and title in and to the land described in said bill of complaint.

Sixth: Because the rights of defendant, if any, by reason of the filing of its amended map of definite location and its relinquishment, were subordinate to the rights of complainant in the land in question.

Seventh: Because the defendant did not complete its railroad crossing complainant's land within the time required by law.

Eighth: Because the rights of complainant to the land in question were at all times prior and superior to the rights of the defendant, if any, in the land described in the bill of complaint.

Ninth: Because complainant will be irreparably injured by the dismissal of his bill of complaint.

Tenth: Because the complainant will be irreparably injured if a permanent injunction is not issued in this cause perpetually enjoining the said defendant from constructing and maintaining its railroad across the lands of complainant described in the bill of complaint.

WHEREFORE, the complainant prays that said decree be reversed and the District Court directed to grant him the relief prayed for in the bill of complaint herein.

FRANCE & HELSELL,
Solicitors for Complainant.

Indorsed: Assignment of Errors.

Filed in U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Copy of within assignment of errors received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,
Solicitor for Defendant.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, George M. Taggart, as principal, and American Surety Company of New York, a body corporate, duly incorporated under the laws of the State of New York and authorized to transact business in the State of Washington, as surety, executing this bond in behalf of said principal, are jointly and severally held and firmly bound unto Great Northern Railway Company, a corporation, the defendant above named, its successors, and assigns, in the just and full sum of Two Hundred Fifty and no-100ths Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our, and each of our, successors, heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1913.

The condition of this obligation is such that

WHEREAS, on the 22nd day of January, A. D. 1913, in the above entitled Court and action a decree was entered dismissing the said action and awarding costs, and the said George M. Taggart having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said decree, and a citation directed to the said Great Northern Railway Company is about to be issued citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California;

NOW THEREFORE, if the said George M. Taggart shall prosecute said appeal to effect and answer all costs that may be awarded against him, if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and effect.

GEORGE M. TAGGART,
By FRANCE & HELSELL, (SEAL)
His Attorneys.
AMERICAN SURETY COMPANY
OF NEW YORK,
By FRANK C. PAINE,
Resident Vice President.
By W. G. GRAVES,
Resident Assistant Secretary.

The foregoing bond is hereby approved by me this 17th day of July, A. D. 1913.

FRANK H. RUDKIN,
United States District Judge.

Endorsed: Bond on Appeal.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Copy of within bond received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,
Solicitor for Great Northern Railway Co.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART, Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, Defendant.

CITATION ON APPEAL.

United States of America—ss.

The President of the United States to Great Northern Railway Company, a corporation:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein George M. Taggart is appellant and you, Great Northern Railway Company, a corporation, are appellee, to show cause, if any there be, why the decree

in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 17th day of July, A. D. 1913, and of the Independence of the United States the 138th year.

FRANK H. RUDKIN,

(SEAL) United States District Judge for the Eastern District of Washington, Northern Division.

Service of the foregoing citation upon said appellee this 18th day of July, 1913, is hereby acknowledged.

CHARLES S. ALBERT,

Solicitor for Great Northern Railway Co.

Received copy of the foregoing citation lodged with me for appellee this 18th day of July, 1913.

W. H. HARE,

Clerk of said Court.

By FRANK C. NASH,

Deputy Clerk.

Indorsed: Citation on Appeal.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

Copy of within citation received and service of the same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,

Solicitor for Defendant, Great Northern Railway Co.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

CITATION ON APPEAL.

Lodged Copy.

United States of America—ss.

The President of the United States to Great Northern Railway Company, a corporation:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein George M. Taggart is appellant and you, Great Northern Railway Company, a corporation, are appellee, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United

States of America, this 17th day of July, A. D. 1913, and of the Independence of the United States the 138th year.

FRANK H. RUDKIN,
(SEAL) United States District Judge for the Eastern District of Washington, Northern Division.

Service of the foregoing citation upon said appellee this 18th day of July, 1913, is hereby acknowledged.

CHARLES S. ALBERT,
Solicitor for Great Northern Railway Company.

Received copy of the foregoing citation lodged with me for appellee this 18th day of July, 1913.

W. H. HARE,
Clerk of said Court.
By FRANK C. NASH,
Deputy Clerk.

Indorsed: Citation on Appeal, Lodged Copy.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk.
By FRANK C. NASH, Deputy.

Copy of within citation, lodged copy, received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,
Solicitor for Defendant, Great Northern Railway Co.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

STIPULATION WITH RESPECT TO THE RECORD.

IT IS HEREBY STIPULATED BY AND BETWEEN THE PARTIES HERETO that the Clerk of this Court, in making up his return to the citation on appeal herein, shall include therein the following:

Subpoena with Marshal's return thereon.

Bill in Equity.

Application for Preliminary Injunction.

Notice of Application.

Answer and Exhibit A attached thereto.

Stipulation waiving verification.

Stipulation that Exhibits referred to in agreed state-statement of facts.

Exhibits A, B, C, and D.

Stipulation that Exhibits referred in agreed statement of facts need not be attached to said stipulation.

Affidavit of A. M. Anderson.

Affidavit of M. J. C. Andrews and map attached.

Opinion of Court.

Decree dismissing action.

Assignment of errors.

Petition for appeal and order allowing the same.

Bond on appeal.

Original citation, with acceptance of service thereof.

Copy of citation lodged with clerk for appellee.

Stipulation with respect to the record.

Order with respect to the record.

which comprise all the papers, records and other proceedings which are necessary to the hearing of the appeal in said action in the United States Circuit Court of Appeals, and that no other papers, records or other proceedings than those above mentioned need be included by the clerk of said court in making up his return to said citation as a part of such record.

IT IS FURTHER STIPULATED AND AGREED that the application for preliminary injunction, notice of hearing, stipulation waiving verification, Exhibit A attached to the answer and exhibits referred to in the stipulation for submission of cause on agreed statement of facts, numbered "A" "B" "D", and that map attached to the affidavit of M. J. C. Andrews, need not be printed in the record, but the same may be sent as originals to the Circuit Court of Appeals for the Ninth Circuit in lieu of printing the same, and that an order of the above entitled Court may be entered to that effect.

FRANCE & HELSELL,
Solicitors for Complainant.

CHARLES S. ALBERT,
THOMAS BALMER,
F. V. BROWN,
Solicitors for Defendant.

Indorsed: Stipulation with respect to the Record.

Filed in the U. S. District Court, Eastern District of Washington, July 30, 1913.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant.

ORDER WITH RESPECT TO RECORD.

It appearing to the Court that upon the hearing of this cause on its merits, there was filed in said cause certain blue print maps which were marked Exhibits "A", "B", "D", which were referred to in the sitpulation of agreed facts, and certain maps attached to the affidavit of M. J. C. Andrews, and the answer of defendant, which maps cannot with convenience be printed as a part of the record on appeal, and it appearing that the parties hereto have stipulated that said maps may be sent to the Circuit Court of Appeals for the Ninth Circuit,

NOW THEREFORE, the Clerk of this Court is hereby directed to omit said maps from the printed record on appeal in his return to the citation on appeal,

and said Clerk is directed to forward the originals of said maps to the Circuit Court of Appeals, in lieu of printing the same in the record on appeal, at the time the said Clerk forwards said record to the Circuit Court of Appeals.

Dated this 31st day of July, 1913.

FRANK H. RUDKIN,
United States District Judge.

Filed July 31, 1913.

W. H. HARE, Clerk.
By F. C. NASH, Deputy.

In the United States District Court for the Eastern District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,
Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 75, inclusive, to be a full, true, correct and complete copy of so much of the record,

papers, exhibits, depositions and other proceedings, in the above and foregoing entitled cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, and as is stipulated for by counsel of record herein, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order, judgment and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and hereto transmit the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of Seventy-six Dollars and Twenty Cents, and that the said sum has been paid to me by Messrs. France & Helsell, solicitors for complainant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 6th day of August, 1913.

(Seal) W. H. HARE, Clerk.

By Frank C. Nash, Deputy

No. 2304

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE M. TAGGART,
Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellee.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

The appellant, George M. Taggart, is a farmer living upon the Columbia River north of Wenatchee. On September 7, 1907, appellant made homestead

entry upon the land in controversy in this action. He has lived upon said land since that time, has improved the same by the erection of buildings, the planting of fruit trees, and the installation of an irrigating system. On February 3, 1912, the United States Government issued to the appellant a patent for said land in which no reservation or mention of a right-of-way was made.

At the time this action was instituted appellee was building a railroad north from Wenatchee along the Columbia River. It threatened to go upon the appellant's land, to make a deep cut across the same, and destroy appellant's fruit trees and his irrigating system, and the railway company made no offer to pay for a right-of-way across appellant's land, but claimed to own such right. This action was begun by appellant to restrain the threatened trespass upon appellant's land by the railway company. After the institution of the action the parties stipulated the facts material to a determination of the action and the same appear in the transcript of record on page 28. The Great Northern Railway Company claims to own a right-of-way across the appellant's land because of an alleged compliance with the Act of March 3, 1875, 18 Stat. p. 482. It is provided in Section 1 of said Act:

> "That the right-of-way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state * * * to the extent of one

hundred feet on each side of the central line of said road; * * *"

Sections 2 and 3 of said act need not be set forth in detail.

Section 4 is as follows:

"That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

It is admitted in the stipulation of agreed facts that on January 2, 1907, the Washington & Great Northern Railway Company, predecessor in interest of the appellee, filed in the Land Office at Waterville, Washington, a map which is marked Exhibit

"A" and has been attached to the original transcript on file in this Court. It is admitted that on March 23, 1908, this map, marked Exhibit "A," was approved by the Secretary of the Interior. It is further admitted by both parties that the Great Northern Railway Company succeeded to all of the rights of the Washington & Great Northern Railway Company under the map, Exhibit "A." On July 31, 1909, the appellee having revised the survey of its line along the Columbia River did file with the United States Land Office at Waterville, Washington, a new map showing a new and different route of its Columbia River branch. The line of route of said Columbia River branch as shown by the second map filed by the appellee differed from the old line shown by the first map in varying degrees. In some instances the new line differed many hundreds of feet from the old line.

After the second map had been filed the Great Northern Railway Company, at the suggestion of the Secretary of the Interior, on May 4, 1911, filed *a profile* of its road. (Transcript, page 35.) This later map showed the elevations and depressions of its entire line. At this point it is important to call the Court's attention to the fact that the two maps filed in 1907 and 1909, respectively, were not profiles of the road but were merely maps of alignment. The first profile of the road was filed on May 4, 1911.

At the time the second map of alignment was filed in the Land Office at Waterville, Washington, on

July 31, 1909, there existed a regulation of the General Land Office (see transcript, p. 33), which provided as follows:

> "When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required except in case of deviations from the right-of-way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior."

This regulation was apparently in force for the purpose of not permitting a railway company to claim a right-of-way under more than one map. The railway company, when it amended portions of its line by filing new maps, was compelled to relinquish its rights in and to the right-of-way shown

by its original maps as to the portions amended. In February, 1912, the appellee filed a release and relinquishment of its right, title and interest in the right-of-way delineated by its first map of alignment filed in January, 1907. This relinquishment is shown as Exhibit "C" on page 38 of the transcript. The amended map of alignment filed at Waterville, July 31, 1909, was approved by the Secretary of the Interior on July 13, 1912.

By reason of the foregoing facts the appellee claims to own a right-of-way across the appellant's land which is prior and superior to any right in the land owned by the appellant. Appellant on the contrary maintains that the appellee by filing the maps heretofore mentioned has acquired no right in appellant's land which is superior to the ownership of the appellant therein, and that the appellee must condemn and pay for a right-of-way over the said land before it can construct its line thereon.

As appears from the opinion of the trial Court (see transcript, p. 51), the cause was, upon the hearing for a temporary injuction, submitted to the trial Court for a final decree upon the merits upon the agreed statement of facts. The Court entered a decree dismissing the bill of complaint, which was filed on January 22, 1913. The complainant in the Court below has prosecuted this appeal from said decree of dismissal.

SPECIFICATION OF ERRORS.

The trial Court committed the following errors:

1. The Court erred in holding that the map of alignment, Exhibit "A," was a profile under the meaning of the Act of March 3, 1875, and the filing of such map in the Land Office at Waterville was a compliance with the said act giving to the appellee a right-of-way across the land in controversy superior to the right of appellant in said land.

2. The Court erred in holding that the right of appellee to build its railroad according to the amended map of alignment became vested in the appellee as of January 2, 1907, the date of filing at Waterville, Washington, the first map of alignment.

3. The Court erred in declining to hold that before the appellee could acquire a right-of-way across appellant's land it must file in the Land Office at Waterville a profile of said line of railroad, showing the elevations and depressions of the right-of-way.

4. The Court erred in refusing to hold that the relinquishment filed by the appellee, marked Exhibit "C," was not a relinquishment of any right of the appellee in the land in controversy under the map of alignment filed January 2, 1907.

5. The Court erred in refusing to hold that the filing of the amended map of alignment on July 31, 1909, was in effect an abandonment and relinquish-

ment of any rights of appellee under the original map of alignment.

6. The Court erred in holding that the appellee acquired rights in the land in controversy prior to those acquired by the appellant.

7. The Court erred in dismissing the bill of complaint in this action upon the ground that the appellee acquired a right-of-way in the land in controversy before the appellant acquired any interest in said land.

BRIEF OF ARGUMENT.

1. In acquiring a right-of-way under the Act of March 3, 1875, a railway company acquires no rights as opposed to possessory claimants upon the public lands until a profile of its road is filed in the local Land Office and approved by the Secretary of the Interior.

> *Spokane Falls etc. Ry. Co. v. Ziegler,* 167 U. S. 65.
>
> *Minneapolis etc. Ry. Co. v. Doughty,* 208 U. S. 251.

Actual construction of the road upon the ground is a substitute for filing the profile.

> *Jamestown etc. Ry. Co. v. Jones,* 177 U. S. 125.

The approval of the Secretary of the Interior relates back to the date of filing the profile in the local Land Office and eliminates the rights of possessory

claimants which have been initiated after the filing in the local Land Office and before the approval of the Secretary.

Stalker v. Oregon Short Line etc. Ry. Co., 225 U. S. 142.

Appellant will contend that the word "profile" in the Act of March 3, 1875, means what it says, namely, a map showing the depressions and elevations in the line of the railroad or a drawing showing a vertical section of ground along a surveyed line or graded work. Appellant contends that the filing of a map of alignment is not a compliance with the terms of the statute and that since no profile of the road was filed by the appellee prior to May, 1911, that the appellant's right which were acquired in September, 1907, are prior to those of appellee and must be condemned and paid for.

When a word has a certain and distinct meaning, such as the word "profile," there is no room for construction. The courts have no power under the guise of construction to change one word into an entirely different one.

Hamilton v. Rathbone, 175 U. S. 414, 421.
U. S. v. Goldenberg, 168 U. S. 95, 102.

The construction by the Department of the Interior can in this instance have no force. No executive department of government can by construction change one word into another. The courts have never permitted the contemporaneous construction of a law by the executive department to overrule the

express and certain terms of the law itself. It is only in cases where ambiguity exists that the courts will notice the construction put upon a law by the executive department.

Houghton v. Payne, 194 U. S. 88, 99.
St. Paul etc. Ry. Co. v. Phelps, 137 U. S. 528.
Fairbanks v. United States, 181 U. S. 311.
United States v. Grand Rapids, etc. Ry. Co. 154 Fed. 131, 136.
United States v. Tanner, 147 U. S. 661.
Morrill v. Jones, 106 U. S. 467.

The grant of a right-of-way to the railway company under the Act of March 3, 1875, is a sheer gift from the government and the doctrine of strict construction should apply to such grants. Every intendment will be resolved against the grantee.

Lewis' Sutherland Statutory Construction, 2nd edition, Sec. 548.

A corollary of this rule is that the court will not hold that the railway company has acquired a right-of-way under the Act unless a strict compliance with the terms of the law is shown.

It has been the custom of some railroads to file both a profile of the road and a map of alignment at the same time.

Rio Grande v. Stringham (Utah), 110 Pac. 868.
Chicago etc. Ry. Co. v. Van Cleave (Kan.), 33 Pac. 472.

In support of the appellant's contention that the Act of March 3, 1875, requires a *profile* in fact to be filed in the local Land Office, we cite a decision of this Court which is conclusive on the point. The meaning of the word "profile" has been carefully considered by this Court and appellant's position in this brief has been adopted in the case of *United States v. Minidoka S. W. R. Co.*, 190 Fed. 491. This case is squarely decisive of this action and forecloses further discussion.

Conceding for the sake of the argument that the filing of a map of alignment is a sufficient compliance with the Act of March 3, 1875, appellant contends that by relinquishing all rights in the map of alignment of 1907 and by the preparation and filing of a new map in 1909, showing a new and different route the appellee must be held to have lost all rights by virtue of the map relinquished. When it appears that the railroad company filed a new map in 1909, showing a different line to be followed by the railroad, and that the railroad is actually constructing its railroad according to the second map, then all of the appellee's rights to a right-of-way adjoining the new line depend upon the map which shows that new line; that the date of acquiring a right to build is of course the date of filing the map which describes the line under actual construction.

The railroad company is now building its line by virtue of the approval by the Secretary of the Interior of the second map filed. The approval by the

Secretary of the second map can only relate back to the date of filing that map.

Stalker v. Oregon Short Line etc. Ry. Co. 225 U. S. 142.

Since the right of construction dates only from 1909 then the interest of the railroad in the right-of-way can only date from the same time.

The right of any railroad in a right of way under the public land grants can only date from the time of fixing the final route which is to be followed.

Missouri etc. Ry. Co. v. Cook, 163 U. S. 491.
Washington & I. Ry. Co. v. Couer D'Alene R. Co. 160 U. S. 77.
Union Pacific v. Harris, 215 U. S. 386.
Montana Ry. Co. 21 L. D. 250.

The issuance to appellant of a patent without reserving any right of way is an adjudication by the executive department that the right of the railroad dates from the filing of the new map.

Smith v. Northern Pacific, 58 Fed. 513.

ARGUMENT.

Before coming to the exact points involved in this case it will be well for us to consider a few of the more important cases in which has been construed the Act of March 3, 1875, granting to railroad companies a right of way across the public domain. It was first contended by the railroads under that act that their rights accrued to the right of way as of the

date of survey. This question was finally settled in the case of *Minneapolis etc. Ry. Co. v. Doughty,* 208 U. S. 251. In that case the Court held that no rights were acquired by the railway until the filing of a profile of its road with the register of the local Land Office and the subsequent approval by the Secretary of the Interior. Prior to that decision it had been held in *Jamestown etc. Ry. Co. v. Jones,* 177 U. S. 125, that actual construction of the road could be used in lieu of filing a profile.

See *Spokane Falls etc. Ry. Co. v. Ziegler,* 167 U. S. 65.

The last important case construing this act is *Stalker v. Oregon Short Line etc. Co.,* 225 U. S. 142. In that case it is held that the approval by the Secretary of the Interior of a map of station grounds relates back to the date of filing said map in the local Land Office and that the railway company takes precedence over a settler whose rights have been initiated after the filing in the local Land Office and before the approval of the Secretary.

All the foregoing cases when taken together emphasize the fact that no rights can be acquired by a railway company under the Act of March 3, 1875, until a profile of the road is filed in the local Land Office; that there must be some definite unequivocal act which fixes the way acquired by the railroad under the statute. Under said decisions the railroad may fix and determine the limits of the land which it acquires either by constructing the road

upon the ground or by preparing a profile of its road and filing it in the local Land Office. This act of filing the profile fixes once and for all its route. The railroad must, if it desires to claim by virtue of the profile filed, build according to the route designated upon its profile.

Since the railroad can acquire no right of way until it files a profile of its road as required by the Act of March 3, 1875, it becomes of first importance to learn when the appellee in this case filed its profile as required by law. If appellant's rights to the land were initiated prior to the filing in the local Land Office of the profile required by law, then appellant's rights are prior to those of the railway and the right-of-way must be condemned and paid for.

It is conceded by the stipulation of facts that no profile of its road was filed by the appellee until May 4, 1911. (See paragraph XIII of the stipulation, p. 35 of transcript.) Appellee, however, contends that it did file Exhibit "A" which is a map of alignment on January 2, 1907, and Exhibit "B" which is another map of alignment, on the 31st day of July, 1909. We ask the Court to carefully examine these two maps with a view of determining their general character and nature. These maps are not profiles in any sense of the term. They cannot be held to come within the express provision of the statute. They are maps of alignment alone. They do not show the elevations and depressions of the railroad line and do not pretend to do so. The word "profile" used in the Act of March 3, 1875,

has a certain and distinct meaning. There is no ambiguity about it. A profile of a railroad is a map showing the elevations and depressions of said road. From said map it can be determined the exact elevation at which said road crosses a particular piece of land.

"A profile is the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows."—Standard Dictionary.

It also means, "a drawing showing a vertical section of ground along a surveyed line or graded work, as of a railway, showing elevations, depressions, grades, etc."—Webster's International Dictionary.

The word "profile" is one of a very few words which have but one single, clear, distinct meaning. Any civil engineer will answer readily that a profile must of necessity show depressions and elevations; it must also show the grades. There can be no ambiguity in the use of such a word. There is not the slightest opportunity for construction or interpretation, and yet the appellee has insisted and does insist that the filing of a map of alignment such as Exhibits "A" and "B" is a compliance with the law and that by the filing of such maps a right-of-way was acquired. Unless courts are prepared to absolutely ignore the express terms of a statute, this contention cannot be sustained.

We desire at this point to meet certain contentions which have been made and will be made by the appellee in regard to this word "profile." In the

first place the appellee contends that the law did not intend the word "profile," but meant a map of alignment. This is, of course, a contradiction in terms, because the courts can only determine what the legislative body meant by the words used. The word "profile" cannot mean and has never meant a map of alignment. We know of no rule whereby the courts can say that when Congress used the word "profile" it meant something else entirely different. It is the business of courts to interpret the law as it is found. If there is no ambiguity then there is no room for construction.

In *Hamilton v. Rathbone,* 175 U. S. 421, the Court spoke as follows:

> "Indeed, the cases are so numerous in this Court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary."

In *United States v. Goldenberg,* 168 U. S. 95, 102, the Court said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are

> few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Appellee relies very strongly upon the fact that the regulations of the Department of the Interior provide in regard to this act that the word "profile" is understood to intend a map of alignment. We earnestly submit that the officials of the General Land Office cannot by construction change one word into another. The word "profile" has a distinct and certain meaning and there is neither power in the Land Office nor in the courts by construction to waive a strict provision of law and substitute one requirement for another. It has been conceded by all courts, including the courts rendering the decisions above cited, that in order to acquire a right-of-way under the Act of March 3, 1875, railway companies must strictly comply with the requirements of that act. It may have been within the power of the Secretary of the Interior to require the railroad to file a map of alignment in addition to the profile mentioned in the statute, but there could be no authority in that official to waive a provision of the law.

It is insisted that the construction placed upon the law by the Land Office should control. It has, however, never been admitted that the Land Office

could by construction waive the express requirements of the law. And courts, under the doctrine of contemporaneous construction by the executive department, have never yielded to the executive department the inherent powers of the judicial department of the Government. It is a well established principle that the doctrine of contemporaneous construction by the executive department can carry no weight with the courts unless an ambiguity exists. It cannot reasonably be maintained that there exists any ambiguity in the word "profile." There is another rule of construction which is of universal acceptation. That rule is that the courts will accept the meaning of words in their ordinary usage; that the lawmaker is presumed to know the meaning of words and to use them for a purpose. That courts will not accept executive construction of law except where a positive ambiguity exists, we cite the following authorities:

Houghton v. Payne, 194 U. S. 88, 99, in which the Court said:

> "But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States v. Graham,* 110 U. S. 219; *United States v. Finnell,* 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as

> to the original correctness of such construction. A custom of the department, however, long continued by successive officers, must yield to the positive language of the statute."

The same principle is sustained in *St. Paul etc. Ry. Co. v. Phelps,* 137 U. S. 528.

In *Fairbank v. United States,* 181 U. S. 311, the Court, after reviewing many authorities upon this subject, said:

> "From this resume of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

In *United States v. Grand Rapids etc. Ry. Co.,* 154 Fed. 131, 136, the Court said:

> "The construction put upon the grant by the land department, as not excepting lands reserved for Indian purposes, cannot legally pre-

vail against a clearly correct legal interpretation."

See

United States v. Tanner, 147 U. S. 661.
Morrill v. Jones, 106 U. S. 467.

We call the Court's attention to the doctrine of strict construction which should control in cases of the grant of privileges and gifts from the Government. In this case the appellant is a man who has acquired the full legal title to the land to be crossed by the railroad. He has acquired it by his residence upon the land, by his cultivation of the soil, by the improvements he has placed upon his farm, and by his payments to the United States Government. The appellee on the other hand claims a right-of-way across this land by a gift from the United States Government. Even had the appellee filed a profile as required by law, the peculiar construction of the five-year limit mentioned in Section 4 of the Act of March, 3, 1875, permits the railroad to wait in the construction of its line as long as it desires to do so. Under the decision no one can complain but the United States Government. It follows, therefore, that it should be and has been the policy of the courts to require a strict compliance by the railway company with all the provisions of the law before it will be said that it has acquired such a right across the public lands. In other words, the doctrine of strict construction has been applied to such grants. That doctrine is

that every intendment will be resolved against the grantee.

In *Lewis' Sutherland Statutory Construction,* 2nd ed. Sec. 548, the following well known rule is enunciated:

> "They are construed strictly in favor of the government on grounds of public policy. If the meaning of the words be doubtful in a grant designed to be of general benefit to the public, they will be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the former beyond the natural and obvious meaning of the words employed."

It should be the rule then that where the rights of an intervening possessory claimant are in question, the courts will require a showing that the strict letter of the law granting the right-of-way has been followed. In no such instance should the officials of the Land Office or the courts, in lieu of a strict construction, waive or ignore the words of the act itself.

That there is a clear distinction between a map of alignment and a profile is conceded in the stipulation by the parties themselves. The maps filed by appellee in 1907 and 1909 are referred to as maps of location or alignment. It is conceded, on page 35 of the transcript, that appellee did file a *profile* in the United States Land Office at Waterville, Washington, on May 4, 1911. The fact that the

appellee did file a profile should estop it from contending that the other maps were in any sense profiles. A superficial examination of the two maps marked Exhibits "A" and "B" will show that they bear no resemblance to a profile. We desire again to remind the court that by the express provisions of the Act of March 3, 1875, no rights pass to the railroad until a *profile* of the road has been filed in the local Land Office and that profile has been approved. Therefore, no rights of any sort were acquired by the appellee until the profile was filed in May, 1911. That a profile is a useful and practicable map to be filed by the railroad is shown by the fact that one was actually filed. Furthermore, one of the entire line was actually filed. Why, indeed, should this profile of the entire road be filed were it not the instrument required by the Act of March 3, 1875? If a profile of the road had been filed in the local Land Office prior to the initiation of the appellant's homestead entry, information could have been obtained which would indicate the exact elevation at which the railroad would cross appellant's land; his irrigating system could have been adjusted to the elevations prescribed in the profile; other valuable information as to the cuts and fills across said lands would have been available. It is perfectly clear that a profile in fact was what Congress intended when it used the word.

It has been the custom of some railroads to file both a profile of the road and a map of alignment

at the same time. In many cases the court recites that a profile and map were filed.

See

Rio Grande v. Stringham (Utah), 110 Pac. 868.

Chicago etc. Ry. Co. v. Van Cleave (Kan.), 33 Pac. 472.

It is true that in many cases the word "profile" and the term "map of alignment" have been used interchangeably, but this has been because the point was not under consideration in those cases. The only decision of any Court construing the Act of March 3, 1875, in which this point has been decided is the case of *United States v. Minidoka etc. S. W. R. Co.,* 190 Fed. 491. That case was decided by this Court, and was an action brought by the United States to restrain the defendant railroad company from constructing a railroad across certain lands of the United States. The evidence showed that the land which the railroad sought to cross was thrown open for the purpose of the reclamation act only. The court held, however, that the lands were public lands of the United States under the Act of March 3, 1875, and that a right-of-way could be obtained over them. At the outset the Court adopts the fundamental rule of construction for such grants, namely, that since they are grants or gifts from the Government they must be strictly construed against the railroad. A corollary of the same rule of construction would be that nothing

passes until the railroad company complies strictly with all of the requirements of the act. This Court, in discussing the very point in question, namely, the meaning of the word "profile," uses the following language:

> "It is to be observed that the map required to be filed with the register of the Land Office and approved by the Secretary of the Interior by the Act of March 3, 1875, is a profile of the road. This is something more than an alignment map or a map of definite location. A 'profile' is 'the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows.'—Standard Dictionary. 'A drawing exhibiting a vertical section of the ground along a surveyed line, or graded work, as of a railway, showing elevations, depressions, grades, etc.'—Webster's In. Dictionary. 'A vertical section through a work or a section of country, to show the elevations or depressions.'—Century Dictionary.
>
> With a map of this character before the Secretary of the Interior showing the contour of the projected line of railroad through the public lands included in an irrigation and reclamation project, he can determine whether the construction of such a road would interfere with the project. He can determine, also, whether suitable provision has been made for the crossing of canals and other waterways, and, if not, what provision is required to preserve the

work of the reclamation service from encroachment and impairment. All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road."

This is a formal binding adjudication by this Court upon the point here relied upon. The matter has been carefully and seriously considered in a separate paragraph of that decision.

We earnestly submit that this case last referred to is squarely decisive of this action and forecloses all discussion of the point in controversy.

The Filing of the Second Map of Alignment.

Conceding now for the sake of the argument that the filing of a map of alignment was all that the Act of March 3, 1875, required, it is appellant's contention that by reason of the filing of the second map of alignment in 1909, the Great Northern Railway Company has abandoned and lost all rights which it ever had by reason of the filing of the original map of alignment in 1907. The Court will recall that the stipulation of agreed facts shows that on July 31, 1909, a second map called an amended map of definite location was filed by the Great Northern Railway Company. (See transcript, p. 32, par IX.) This map appears in the record as Exhibit "B." By reference to the two maps of alignment, Exhibits "A" and "B," it appears that as to the land owned by appellant the two lines of railroad are separate and distinct. As to appellant's land the two lines are about twenty feet apart. The Court will fur-

ther observe that in certain sections of the map, Exhibit "B," the amended line of railroad is many hundred feet from the old line shown in the original map. It is apparent then that the railway company discovered that it had not fixed upon the proper route for the railroad and desired to change the same. It will also be noticed that the appellee, in order to acquire any rights by reason of the amended map, took all of the steps required by the Act of March 3, 1875, in the same manner that its predecessor in interest had done in filing the original map. The officials of the Land Office withheld their approval of the second map for some period of time, and it will be conceded by all parties that until the approval by the Secretary of the second map was obtained no rights were acquired by the railroad. In other words, the railroad company initiated its rights over again.

As appears from all of the cases heretofore cited construing the Act of March 3, 1875, it has been definitely settled that no rights can be acquired by the railroad to any particular land until the line of the railroad is definitely fixed by filing a proper map in the local Land Office. When the line of the railroad is established the limits of the grant also become established. Because the grant is of a right-of-way one hundred feet wide on each side of the central line of said railway, the limits of the right-of-way are determined solely by reference to a fixed line and that fixed line is established by the filing of the proper maps in the local Land

Office. Since it is the fixing by the railroad of the line which it will follow which determines the grant of the right-of-way, it is appellant's contention that the railway's rights depends entirely upon the map which does in fact indicate the line which the railroad is actually constructing. It is apparent that the railway company is building according to the line shown upon the second map. This is shown by the relinquishment filed by the company as to the rights acquired under the 1907 map. (See Exhibit "C", p. 38 of the transcript.) We contend that when the old line is abandoned and the railway unequivocally shows that it is not building according to that old line, all rights by virtue of the old line and by virtue of the old map must fall. The right-of-way fixed and determined by the old map and by the old line shown in said map must as a matter of course be lost to the railroad when it announces its intention of abandoning the line which fixes the right-of-way. Or the reverse of the same proposition is this: that when a railroad desires to change its mind as regards the line which it will build and to that end files a new map and initiates its rights again, then the right of the railroad in and to the right-of-way for the construction of said line must depend upon the map which describes that line.

The railway company, while conceding that it is building its railroad according to the new route, claims title to the right-of-way by virtue of the old route.

Since the two lines are twenty feet apart there is

a portion of the old right-of-way which appellee admits has been lost. It disclaims any interest in twenty feet of the old right-of-way. There is no reason to support the contention that the railroad may relinquish a part of the right-of-way and retain the rest. There is nothing in the law which permits dividing the right-of-way into shreds. The acquisition of the old right-of-way depended upon the establishment of a line. The abandonment of that line causes the whole right-of-way to fall.

Let us inquire how came the twenty feet to be lost to the railroad. It became lost because the railroad formally announced its intention of changing its line and since the old route was abandoned the right-of-way and the whole of the right-of-way fell with it. From an examination of the amended map the Court will notice that in some instances the old line and the new line are separated by many hundreds of feet. In such instances the railroad's rights depend solely upon the new line. If, then, on both sides of appellant's land the rights of the railroad depend entirely upon the new map showing the new line, do not all of the portions of the road where the right-of-way has been changed depend upon the same map, namely, the map according to which the road is being built?

Let us examine the situation from another point of view. Suppose that appellant had not acquired an intervening right in that particular land in question and that at the time of the filing of the new map the land was still a part of the public do-

main, the railroad would then claim to own two hundred feet across said land by virtue of the new map. It would not refer to the old map whatsoever. It cannot be true that the rights of the railroad to twenty feet of appellant's land is derived from one map, and the right to one hundred and eighty feet is derived from another map.

To prove that the rights of the railroad must depend upon the map, according to which the road is being built, let us take another example. Suppose the limits of the right of way under the new line overlapped upon the limits of the right-of-way under the old line to the extent of only twenty feet, could it be contended that the railroad then owned twenty feet of right-of-way under the old line and one hundred and eighty feet under the new? Suppose that on this particular tract of land the old line and the new line crossed at right angles, would the railroad be able to contend that it owned a rectangular piece of right-of-way at the intersection of the two lines by reason of the old map, and owned all the rest of the right-of-way under the new map? These illustrations show clearly that the right-of-way of the railroad must depend entirely upon a single map and that map, of course, the map according to which the line is being built.

While Exhibit "B" is called upon its face an amended map of definite location, it is in fact not an amendment but a completely new map. Each step for the acquisition of the right-of-way according to that map was taken in the same manner that would

have obtained had it been the only map ever filed. The appellee did not attempt to amend simply those portions of the road in which it became necessary to construct its railroad beyond the limits of the old right-of-way. It made no request in such particulars to amend its line, but it has filed a completely new map showing a completely new line. Having thus initiated the procedure all over again, it should not now be permitted to say that it still claims title under a map which has been in fact abandoned.

The true test to determine the date of acquiring the right to build its road across the public lands is found by determining the date of filing the map of the final and ultimate line adopted by the railroad for the actual construction of the road. The right of the railroad can never depend upon various maps showing various lines or routes. There must be one and only one map which fixes the right of way. It follows irresistibly that the rights of the railway in all of the sections of land must depend upon the same map.

In the case of *United States v. Minidoka etc. S. W. R. Co.,* 190 Fed. 491, it was held that the approval of the map by the Secretary must be obtained before the road can be built. All rights are suspended until such approval is obtained. In order to determine the exact legal effect of filing the second or amended map, let us consider what were the rights of the railroad company prior to the approval of said second map. We have seen that in

the case of *Stalker v. Oregon Short Line etc. Ry. Co.,* 225 U. S. 142, that the approval of the Secretary relates back to the filing of the map. The approval by the Secretary of the second map could relate back only to the date of filing the map, which he approved. Since the right of the railroad to build the line at all dates from the filing of the amended map in 1909, the rights of the railroad in and to the right-of-way determined by the amended map must date from the same time.

It appears from the transcript of the record, p. 29, par. III that the appellant obtained a patent to the land in controversy in which no reservation of any right-of-way was made. Since this patent was issued after the filing of the second or amended map of location, it is apparent that the officials of the Land Office have construed the amending of the line as a waiver of all rights under the old line as to the portions amended. The issuance to appellant of a patent to all of the land in controversy without reserving any right-of-way for railroad purposes is an adjudication by the executive department that the rights of the railroad date from the filing of the new map and are inferior to those of the appellant.

See

Smith v. Northern Pacific, 58 Fed. 513.

In *Missouri etc. Ry. Co. v. Cook,* 163 U. S. 491, the Court ruled under a grant in aid of a Kansas railroad that the rights were determined by the

filing of the map, and in refusing to discuss the effect of deviations upon the grant, said:

> "Whatever the rights of the company in this regard, such a change could not affect the rights of third parties which had in the meantime lawfully intervened."

In *Washington & I. Ry. Co. v. Coeur d'Alene R. Co.,* 160 U. S. 77, the court held that the railroad could construct upon a different line from the one contained in the map, if rights of third parties had not intervened. In all cases it is the act which definitely fixes the line which determines the grant, and the line fixed by the map is presumed to be the line which the road will follow, and when the road desires to change the line and fix a new one, then its rights are determined in the same way by the date upon which that new line becomes fixed and certain. In other words, the grant from the Government to the railroad to build along the new line does not operate until that new line is definitely fixed.

In *Union Pacific v. Harris,* 215 U. S. 386, the railroad claimed right-of-way under several special acts, the last in 1866. The first act prescribed certain definite routes, and it was only in the Act of 1866 that the route was authorized which crossed the land in dispute. The railroad claimed by reason of the earlier laws, but the Supreme Court, in speaking of the date of the grant, said: "But that date must be found in an act prescribing the finally adopted route."

And so in the case at bar, the date of the grant to the railroad must be found in the date of the filing of the map which finally prescribes the exact route which is to be followed, and where the exact route upon which the railroad will be built is first definitely fixed by the new map, then the only right to pursue that line is derived from that new map. See *Montana Ry. Co.*, 21 L. D. 250.

CONCLUSION.

For the two foregoing reasons we earnestly insist that the decree dismissing the bill of complaint in this cause was wrong; that the decree of the lower Court should be reversed, and that the District Court should be instructed to grant an injunction as prayed for in the bill of complaint.

Respectfully submitted,

C. J. France,
Frank P. Helsell,
Solicitors for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE M. TAGGART,
Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellee.
No. 2304

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant's statement of the case is not as complete as might be desired. It contains one or two argumentative assertions which, taken alone, might be misleading to the court. To avoid any chance of a misunderstanding of the controversy between the parties, we desire to make a brief statement of the facts in the case, supplementing and correcting that contained in appellant's brief.

The rights claimed by the appellee are based upon the approval by the Secretary of the Interior of the map filed by the Washington & Great Northern Railway Company on January 2, 1907, some nine months before appellant made his homestead settlement on the land involved in this action. Unless the approval of that map was unauthorized (a point to be considered in the argument) the railway company thereby acquired a right of way across the land entered by the appellant, 100 feet wide on each side of the central

line of its road; for, under the decision in the case of *Stalker v. Oregon Short Line R. Co.*, 225 U. S., 142, the approval of the Secretary of the Interior related back to the date of the filing of the map.

After the approval of this map, and the transfer of all rights thereunder by the Washington & Great Northern Railway Company to the appellee, the Great Northern Railway Company revised the survey and location shown thereon, and on July 31, 1909, filed maps of such revision and of amended definite location of the railway line. These maps were approved July 13, 1912. Before their approval, or, to be exact, on January 12, 1912, the appellee was requested to file "a relinquishment under seal, of all rights under the original approval of said map filed by said Washington & Great Northern Railway Company, as aforesaid, as to the portions thereof amended in said Great Northern Railway Company's map of amended definite location." (Transcript, p. 32).

This relinquishment was requested pursuant to section 19 of the Circular of the General Land Office issued on May 21, 1909, reading as follows:

> "When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required *except in case of deviations from the right of way previously approved,* whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms,

changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval, *as to the portions amended,* said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior." (Transcript, p. 33).

Complying with this rule, the Great Northern Railway Company relinquished to the United States "all its right, title, and interest in and to the right of way pertaining to the line of railway shown upon the maps filed by the Washington & Great Northern Railway Company, and approved by the Secretary of the Interior on the 23d day of March, 1908, as aforesaid, acquired under and by virtue of said approval, excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and re-located line of said company's railway, shown upon the maps thereof, filed in the United States District Land Office at Waterville on the 31st day of July, 1909." This relinquishment, by its terms, became effective upon the approval of the map of amended definite location. (Transcript, pp. 39, 40).

In this connection, we wish to correct one or two erroneous statements in the appellant's brief. At the top of page 6 it is stated that "the appellee filed a re-

lease and relinquishment of its right, title and interest in the right of way delineated by its first map;" and on page 11, in the first sentence of the second paragraph, reference is made to the company's "relinquishing all rights in the map of alignment of 1907." These statements are, of course, incorrect, as the instrument is very specific in relinquishing only that portion of the right of way acquired by the original approval falling outside the 200 foot right of way pertaining to the revised center line.

The revised line, in some instances, is identical with the original survey. At other points the deviation is slight. In a few places, the line shown on the 1909 map is outside the original 200 foot right of way. Across the land in controversy, the center line shown on the map of 1907 is located from 13 to 23 feet easterly of the center line shown on the map of 1909. Accordingly, the relinquishment operated to release from the original 200 foot right of way, a strip varying in width from 13 to 23 feet along the easterly edge thereof. At the bottom of page 25 of appellant's brief the statement is made that "as to the land owned by appellant the two lines of railroad are separate and distinct," and that "the two lines are about twenty feet apart." If counsel mean that the center lines are about twenty feet apart, their statement is correct, but not if they refer to the rights of way. The two lines of railroad overlap to the extent of approximately 180 feet. This 180 foot strip constitutes the land involved in this controversy. The stipulation of facts upon which the cause was submitted, contains the following paragraph:

"That the only land in said Lot 4 which said defendant proposes to occupy in the construction, maintenance or operation of its railroad across said Lot 4, is a strip of land about 180 feet in width, being all that part of a strip of land 100 feet wide on each side of the center line shown in the map of definite location filed January 2, 1907, located and remaining within the lines of a strip 100 feet wide on each side of the center line shown on the map of amended definite location filed July 31, 1909." (Transcript, p. 36).

ARGUMENT.

Appellant contends that the railway company has no right to build its railroad across his homestead for two reasons:

First, that the map filed by the Washington & Great Northern Railway Company on January 2, 1907, which was approved by the Secretary of the Interior on March 23, 1908, was not "a profile of its road" as that term is used in the act of March 3, 1875, and therefore its approval was unauthorized:

Second, that if a right of way was acquired by the filing and approval of that map, the railway company, by the filing of the map of July 31, 1909, showing a slightly different center line across the land in controversy, lost all rights acquired by the filing and approval of the original map.

We will consider these questions in their order.

I.

The 1907 Map Conformed to the Requirements of the Act.

The whole of appellant's argument is based upon a misapprehension of the sense in which the word "profile" is used in Section 4 of the Act of March 3, 1875. Counsel assume that the word was used by Congress in a secondary, technical and restricted sense, and have omitted, in their references to the dictionary, to quote those portions of the definitions showing the primary meaning and use of the word. Those portions of the definitions quoted refer to the technical meaning of the word "profile" in the profession of civil engineering. The omitted parts of the

definitions show that the word has a much broader meaning in general use.

"Profile: 1. *An outline or contour;* as the profile of an apple. 2. A human head seen or represented sidewise, or in a side view; the side face or half face; a side or sectional elevation, as (a) *Arch.,* a section of any member at right angles with its main lines; (b) *Civ. Eng.,* a drawing showing a vertical section of ground along a surveyed line or work; (c) *Fort.,* any section of a fortification made by a vertical plane, perpendicular to the principal lines of the work."

Webster's International Dictionary, 1909.

"1. *An outline or contour;* a drawing in outline.

"2. The outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows; generally with the vertical scale much greater than the horizontal."

Standard Dictionary, 1909.

"1. *An outline or contour;* specifically the largest contour of anything, usually seen in or represented by a vertical longitudinal section or side view. . . . (d) in engineering and surveying, a vertical section through a work or section of a country to show the elevations and depressions."

Century Dictionary, 1911.

"1. *A drawing or other representation of the outline of anything.* . . . 4. A sectional drawing, generally vertical."

Oxford Dictionary, 1909.

These definitions show that the unanimously accepted primary meaning of the word "profile" is "an outline or contour." It is only when technically used in the profession of civil engineering that the word has the restricted meaning contended for by appellant. Furthermore, it is a significant fact that only in the late dictionaries is this technical meaning of the word given. For instance, Webster's Unabridged Dictionary of 1887 (the earliest dictionary to which we have had access), defines the word thus:

> "1. *An outline or contour.* 2. *Paint. & Sculpt.,* a head or portrait represented sidewise, or in a side view, the side face or half face. 3. *Arch.,* the contour or outline of a figure, building or member; a vertical section."

We may admit counsel's assertion that any civil engineer will answer readily that a profile must of necessity show depressions and elevations, but it does not necessarily follow that Congress used the word in the sense in which it is employed by civil engineers. On the contrary, it is much more likely that the word was used in its ordinary sense. It is fair to presume that a general act of the character of the law of March 3, 1875, would be framed by Congress only after conference with the officials of the Land Department, to whom its administration was to be entrusted; and it is to us almost conclusive proof of the correctness of our position, that the Land Department has always construed the act as it was construed by Judge Rudkin.

On March 9, 1878, a Circular of Instructions under the act was issued by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, containing the following paragraph:

> "Upon the location of any section of the line of route of its road, not exceeding twenty miles in length, the company must file with the Register of the land district in which such section of the road, or the greater portion thereof, is located, a map, for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands according to the public surveys."
>
> *Copps Public Land Laws* 1882, p. 818.

The map here described is a map showing the center line of the railway, and not a "profile", in the technical sense for which appellant contends. Such a map would not show the termini of the road, its length or its route over the public lands, according to the public surveys, nor could the department determine therefrom the several tracts of land over which the right of way was sought to be acquired, and which were to be disposed of, under the act, subject to such right of way.

The departmental instructions of March 9, 1878, quoted above, were carried bodily into the circular of November 7, 1879, *(Copps Public Land Laws* 1882, p. 724,) and into the circular of January 13, 1888, (12 L. D., 423.)

Since 1898 the requirement of the department has

been specific that a map of alignment, and not a profile, in the technical sense, is intended by the act of 1875.

> "The word 'profile' as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the land is located. They must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of the station grounds."
>
> *Subdivision 6 of Circular of November 4, 1898,* 27 L. D., 665.
>
> *Subdivision 6 of Circular of February 11, 1904,* 32 L. D., 485.
>
> *Subdivision 6 of Circular of May 21, 1909,* 37 L. D., 790.

We believe the court will concur in the conclusion of the District Judge, that this construction of the law by the officials charged with its administration, has been acquiesced in by all the departments of the government for so long a period that it should now be accepted by the courts.

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards v. Darby,* 12 Wheat., 210; *U. S. v. Bk.*, 6 Pet., 29; *U. S. v. Macdaniel,* 7 Pet., 1. The officers concerned are usually able men and mas-

ters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

United States v. Moore, 95 U. S., 760, 763; 24 L. Ed., 588.

"Those adjudications, covering a consecutive period of nearly nine years, and, so far as can be gathered from the printed reports of the decisions of that Department relating to public lands, being the only ones bearing upon the subject, ought to be taken as showing conclusively the meaning attached to the phrase 'land subject to periodical overflow', by the officers of the Department whose duty it is, and has been, to administer the swampland grant.

Moreover, if the question be considered in a somewhat different light, viz., as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."

Heath v. Wallace, 138 U. S., 573; 34 L. Ed., 1063.

The rule thus enunciated has especial application where such construction has been acted upon, and

those relying upon it would be prejudiced by a change and rights be devested.

"Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this late day be called in question."

U. S. v. Burlington, etc., R. Co., 98 U. S., 334; 25 L. Ed., 198.

" 'It is the settled doctrine of this court', as was said in *United States v. Alabama G. S. R. Co.,* 142 U. S., 615, 621; 35 L. Ed., 1134, 1136, 12 Sup. Ct. Rep., 308, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging

that it had misconstrued the act of July 2d, 1864."

Hewitt v. Schultz, 180 U. S., 139; 45 L. Ed., 463.

It is asserted in several places in appellant's brief that the only meaning of the word "profile" is that which appellant contends should be affixed to it in the act of March 3, 1875, and a number of cases are cited in support of the well recognized proposition that contemporaneous and practical construction may be used as an aid in determining the meaning of a statute, only when the statute is ambiguous. These premises are made the basis of the conclusion that the courts will not follow the Interior Department in its construction of the act. But we have shown that the major premise is incorrect, and consequently the conclusion is fallacious. Were it true that the word "profile" is one of the very few words which have but one single, clear, distinct meaning, as counsel say in their brief, the principle mentioned would be applicable; but, as we have shown, not only is the term one of many definitions, but the meaning which counsel contend should be given it in the act of 1875 is not that in which it is ordinarily used, but is a restricted and technical meaning, and, furthermore, one which has apparently but recently come into use.

The subsequent legislation of Congress also shows that the word "profile" as used in the act of March 3, 1875, means a map showing the route of the road over the public lands, and not a map showing the grades. Section 5 of the original act provides:

> "That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation, or by act of Congress heretofore passed."

The effect of this section was altered by the act approved March 3, 1899, 30 Stat., 1233; 6 Fed. Stat. Ann., 513, providing:

> "That *in the form provided by existing law,* the Secretary of the Interior may file and approve *surveys and plats* of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

It is evident that this act was designed to permit the location and acquisition of railroad rights of way across lands included within forest reservations and reservoir sites, which was not permissible under the original act. It seems almost too clear for argument that the words "surveys and plats" in the act of 1899 are used with the same meaning as the word "profile" in the act of 1875. The latter act is simply a supplement and extension of the former. Its administration is the same. The "surveys and plats" are to be filed and approved in the form provided by existing law. The use of the words "surveys and plats" shows clearly that no "profile" in the technical sense is required when the railroad crosses forest reserves

and reservoir sites; and it is hardly logical to assume that Congress would require a different map in those cases than in others.

Appellant calls attention to the rule of strict construction which applies to the grant of gifts and privileges from the government, and argues that by analogy it should be the policy of the courts to enforce a strict compliance with the conditions required to be performed by the grantee, to obtain the benefits of such grants. But the grant under consideration here is not in the nature of a bounty or subsidy; it is not even in the class with the numerous grants made by Congress in aid of works of public improvement. Nothing more is granted by the act of 1875 than a mere right of way across unoccupied public lands, which the government was undoubtedly as anxious to see settled as were the railway companies. This is clearly brought out in the case of *U. S. v. Denver etc. Ry. Co.,* 150 U. S., 1, where the court said:

> "The general nature and purpose of the act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped at the time of its passage. It was not a mere bounty, for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement and enhancing the value of those public lands through or near which such railroads might be constructed."

Perhaps the most familiar rule employed in the

construction of statutes is that the legislative meaning is to be determined from the statute as a whole. Every part is to be construed with reference to every other part, and every word and phrase in connection with the context, and that construction sought which given effect to the whole of the statute. A construction which makes its different parts inconsistent with and antagonistic to each other is to be avoided.

"The whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

Pollard v. Bailey, 20 Wall., 520; 22 L. Ed., 376.

"In the exposition of statutes, the established rule is that the intention of the lawbaker is to be deduced from a view of the whole statute, and every material part of the same."

Kohlsaat v. Murphy, 96 U. S., 153; 24 L. Ed., 844.

"Every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Market Co. v. Hoffman, 101 U. S., 112; 25 L. Ed., 782.

"There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected."

Wheaton v. Peters, 8 Pet., 591; 8 L. Ed., 1055.

Appellant asks a construction of one word in section 4 of the act of March 3, 1875, which would nullify practically the entire balance of the section. The court will recall that this section provides that upon the approval of the profile of the road, "the same shall be noted upon the plats" in the local land office," and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." If the profile called for by this section is, as appellant urges, only a map showing the grades of the road, it is apparent that no effect can be given to the rest of the section; for such a map would not show the sections and subdivisions of the public lands crossed by the road. As a matter of fact, it would be utterly unintelligible, for a profile map, as the term is used by civil engineers, does not even serve to show the grades of a surveyed line of road, except when read in connection with a map showing the route of the road. A map showing nothing more than an undulating line representing the grade of a projected railroad, would convey no more meaning than that a railroad with that grade was to be built somewhere in the land district.

It is apparent that the Secretary of the Interior could never intelligently approve such a map, and that the railroad could not be noted upon the plats in the district land office for the information of prospective settlers. And yet counsel asks this court to assume that Congress intended that a map of this character—meaningless and unintelligible to every

one—should be filed by railroads seeking rights of way across the public lands.

It is asserted that had a profile of the road been filed in the local land office prior to the initiation of appellant's homestead entry, information could have been obtained showing the elevations of the railroad across the land entered, and appellant's irrigation system could have been adjusted to the elevations shown in the profile, and other valuable information as to the cuts and fills across said land would have been available. But we have already shown that the statement is unfounded in fact. If the railway company had filed such a map as appellant contends should have been filed, he could not have determined whether the railroad crossed his land at all.

Apparently appellant would have the court believe that he was misled in laying out his farm, by the fact that no profile was filed. But the allegations of his bill show that he never inquired at the land office to determine whether any railroad had been surveyed across his land. He alleges in paragraph two of his bill that upon the allowance of his homestead entry. he entered and resided upon the land and improved the same by the cultivation of the soil, by the erection of farm buildings, by the planting of seventeen acres of fruit trees, and the installation of a pumping system for irrigation purposes. In paragraph five it is alleged that the construction of the railway will take at least 224 fruit trees, and interfere with, and disturb the appellant's irrigation system. If appellant

had taken the trouble to inquire at the land office whether a railroad had been located across the land entered by him, he would have learned that a right of way map had been filed by the predecessor of the appellee, and would certainly have ascertained its location, and refrained from planting fruit trees upon the right of way.

We realize that these considerations cannot operate to alter the terms of the statute, and that if the act required the filing of a profile, as contended for by appellant, the fact that he was not misled by the alleged failure of the company to comply with the statute, cannto operate to impair his rights, or to enlarge ours. We do not advance the argument for that purpose. We mention it simply to show that his claim that he has been misled, is not made in good faith.

Appellant calls attention to the fact that the Great Northern Railway Company did file a profile, showing the grades of its revised line, and would evidently have the court believe that such map was filed as a compliance with the act of 1875. The agreed statement of facts shows that this profile was requested for a purpose entirely disconnected with the act of 1875. Paragraph 13 of the stipulation, appearing at pages 34 and 35 of the transcript, shows that the Washington & Great Northern Railway Company was never called upon or requested to file any profile of the line shown on the map of 1907, and that the Great Northern Railway Company was never called upon or requested to file any profile of the line shown on the

amended map of 1909, until November 17, 1910, "when the Secretary of the Interior requested the Register and Receiver of the Land Office at Waterville to notify said defendant that since the line of its road, as described in said map of amended definite location, crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry or sale, said Great Northern Railway Company would be required to file a profile, showing the elevations and depressions at which the line of its said railway crossed said lands", and that in response to this request the company filed a profile, showing the grades of its entire line. This profile was called for at the instance of the United States Geological Survey, so that that Bureau might determine whether the use of the withdrawn lands as power sites would be affected by the proposed railway.

The chief reliance of the appellant seems to rest in the case of *U. S. v. Minidoka etc. R. Co,.* 190 Fed., 491, where this court took occasion to say that the profile mentioned in the act "is something more than an alignment map, or a map of definite location." It is clear, however, from the opinion of this court and of the Circuit Court (176 Fed., 762) in that case, that no question as to the character of the map required to be filed was presented in the case, and hence the remarks of the court upon that subject were purely *dicta.* That suit was brought by the United States to restrain the defendant from going upon certain reserved lands withdrawn for the purpose of irrigation and reclamation, and constructing a railroad thereon

without the approval of the complainant.

That the railroad company had filed no map of any kind is apparent from the following excerpt from the opinion of this court:

> "It is contended by the Railway Company that having filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, it has placed itself in a position to become a grantee under the act, and having staked and laid out its road across the lands in question, and having established and partly constructed a grade, a right of way has been secured under the act, *notwithstanding no profile of the road has been filed with or approved by the Secretary of the Interior,*"

and from the following statement in the opinion of the District Judge:

> "Apparently for the purpose of claiming some benefit under the railroad right of way act of March 3, 1875, prior to the commencement of this suit and after the definite location of its line of road, the railroad company filed with the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization under the same. *It has not, however, filed any profile map with the register of the local land office.*"

Thus, it clearly appears that the railway company claimed the right, as against the United States, to construct its road across the public lands, upon the filing of a copy of its articles of incorporation and

proof of its organization under the same, without the filing with, or approval by, the Secretary of the Interior, of any map of any character.

Judge Rudkin, in referring to the *Minidoka* decision, quotes from the opinion of this court as follows:

> "The defendant railroad in this case filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same, but has filed no profile map of its road with the register of the land office where the land is located, and no such profile map has been filed with or approved by the Secretary of the Interior,"

and with respect thereto, says:

> "I take it from this that no map of any kind was filed in that case, and that the court did not have before it the validity or sufficiency of the regulations promulgated by the Secretary of the Interior or a map filed in compliance therewith. If it had, I doubt very much whether it would have declared invalid regulations and maps, the validity of which have been recognized and acquiesced in for so long a period, for later in its opinion the court referred to the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands, and said:
>
> 'All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road. . .'
>
> And:

> 'We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map.' "

The opinion of the District Judge leaves little to be added. It is apparent from the statement of the court in the opinion in the *Minidoka* case that something more than a map of alignment is required to be filed was made without argument or the citation of authorities upon that point by counsel, and without reference by the court to the subsequent legislation of Congress, and the uniform and long-continued construction of the act by the Interior Department, recognizing that the word "profile" as used in the Act of 1875, means simply a map showing the outline of the railroad, and its course over the public lands.

In the *Minidoka* case title to the lands in question was still in the United States, and it was claimed by the Government that the failure on the part of the railroad company to file its profile was a condition precedent to the right of a railway company to enter upon the lands at all. In this case the filing of a profile, if it could be claimed that a profile had not been filed, was a condition subsequent, and the failure to so file, can not be taken advantage of by appellant, but can only be taken advantage of by the Government in a proceeding brought for forfeiture on account of failure to comply with the terms of the grant.

S. & B. C. Ry. v. W. & G. N. Ry., 219 U. S., 166.

This point will be more fully considered in the second section of our argument.

Appellant cites the cases of *Rio Grande W. R. Co. v. Stringham* (Utah), 110 Pac., 868; and *Chicago, K. & N. R. Co. v. Van Cleave,* (Kansas), 33 Pac., 472, as showing that it has been the custom of some companies to file both a profile of the road and a map of alignment. It is true that in these cases there are references to filing "a map and profile", but a very casual reading shows that the expression is simply a tautological way of saying that the company filed a map, showing the outline of its road. In neither of these cases was the character of the map filed by the railway company at issue, and by the court's reference to the "filing of a map and profile" nothing more is to be understood than that the company had filed a map in compliance with the act. This is particularly clear in the *Van Cleave* case, where the court, referring to the case of *Noble v. Union River Logging Co.,* 147 U. S., 165, in which the opinion distinctly states that the company filed a map showing the termini of the road, its length and its route through the public lands, says:

> "The attention of the court was directed to the question whether on the approval of the map and profile by the Secretary of the Interior, the company's rights became fixed".

The decisions of the Supreme Court and other courts, show that the profile required by section 4 of

the act, is not a technical "profile map", as the term is employed by civil engineers, but simply an outline of the road, showing its definite location across the public lands. We think counsel for appellant will agree with us that there is no case in which the character of the map filed has been directly in question, but the casual remarks of the judges in a number of cases, show that they regard the act as requiring the filing of a map, showing the definite location of the railway, and not a profile showing the grades only.

Thus, in *Jamestown & N. R. Co. v. Jones,* 76 N. W., 227, affirmed in in 177 U. S., 125, the court said:

> "Sections 3 and 4 treat such settler who has made his settlement prior to the approval of the profile of the road, (which is nothing more than a map of definite location), as possessing superior rights, which must be considered by the railroad company, the same as any other private property."

In *Jamestown, etc., R. Co. v. Jones,* 177 U. S., 125, and in *Minneapolis, etc., R. Co. v. Doughty,* 208 U. S., 251, while the court speaks of the map required as "a profile", it nevertheless finds that after the filing of the articles of incorporation and proofs of organization, the essential act required is "the definite location" of the railroad, and that this may be done either by the construction of the road, or the filing of the map.

That a map of definite location is what the act requires is further shown by the decision of the Supreme Court in the recent case of *Stalker v. Oregon*

Short Line R. Co., 225 U. S., 142, 56 L. Ed., 1027, where the court indiscriminately uses such expressions as "map of alignment", "map of location", map showing the termini of such portion and its route over the public lands", etc.

The Approval By the Secretary of the Interior of the Map Filed By the Railway Company Was a Judicial Act, Constituting An Adjudication of the Sufficiency of the Map, and Is Not Subject to Review in a Proceeding of This Character.

This proposition is established by the decision in *Noble v. Union River Logging Railroad Co.,* 147 U. S. 165, 37 L. Ed. 123, which was an action to restrain the Secretary of the Interior from executing an order revoking his predecessor's approval of the Union River Logging Railroad Company's maps for a right of way over the public lands. The defendant asserted the right to revoke the approval of the maps upon the ground that, since the railroad company was operated solely for the transportation of logs for the private use and benefit of the persons composing the company, it was not entitled to the benefits of the right of way act of March 3, 1875, and hence that the approval of its right of way map by the former Secretary of the Interior was made without jurisdiction, and was therefore void. But the court held that the approved map was equivalent to a patent, and that the title which vested upon the approval could be divested only by a decree of the court in a proper proceeding brought for that purpose by the United States. We quote at length from the opinion of the

court:

"At the time the documents required by the Act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the Act of Congress. Upon being satisfied of this fact, and that all the other requirements of the Act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the Act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road.

"The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

"It is true that in every proceeding of a judi-

cial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action. * * * There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. * * *

"We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the Act vested the right of way in the railroad company. * * * The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose."

Other cases to the same effect might be cited, but as they arose under other land laws, and the above case is squarely in point, we do not cite them here. Many of them are referred to in the opinion in the

Noble case. This case clearly establishes that the Secretary of the Interior, when called upon to examine the proceedings and proofs of railway companies seeking rights of way across the public lands, acts in a judicial capacity, and that his decision as to the sufficiency of the proofs is conclusive, and not subject to review in a collateral proceeding. Accordingly, it must be held that his approval of the maps filed by the predecessor of the appellee, constitutes in itself an adjudication of their sufficency, which cannot be reviewed here.

The same principle is recognized in the opinion of this court in the case of *United States v. Minidoka, etc., R. Co., supra,* 190 Fed. 491, where it is said, at page 499:

> "We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map."

For these reasons, it is respectfully submitted that the District Judge was right in holding that the map filed by the Washington & Great Northern Railway Company, and approved by the Secretary of the Interior, complied with the act of March 3, 1875, and entitles the railway company to construct its railroad upon the right of way described thereon.

II.

No Part of the Right of Way Acquired by the Filing and Approval of the Map of January 2, 1907, Has Been Lost, Except the Portion Voluntarily Relinquished By the Railway Company.

The court will recall that after the approval of the first map and the transfer of all rights thereunder by the Washington & Great Northern Railway Company to the appellee, the appellee revised the survey and location shown on that map, and on July 31, 1909, filed maps of such revision and of amended definite location of said railway line. Later, at the request of the Department of the Interior, and in compliance with its rules, the Great Northern Railway Company relinquished to the United States "all its right, title, and interest in and to the right of way pertaining to the line of railway shown upon the maps filed by the Washington & Great Northern Railway Company, and approved by the Secretary of the Interior on the 23rd day of March, 1908, as aforesaid, acquired under and by virtue of said approval, excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of said company's railway, shown upon the maps thereof, filed in the United States District Land Office at Waterville on the 31st day of July, 1909."

We have pointed out, in our statement of the case, that the center line shown on the first map is located some twenty feet easterly of the center line shown

on the second map, across the land in controversy, and that the relinquishment operated, therefore, to release from the 200 foot right of way acquired by the approval of the 1907 map, a strip some twenty feet wide, along the easterly edge thereof. We also mentioned in our statement, that one of the stipulated facts in the case is that the appellee proposes to occupy, in the construction and operation of its railway line, only that portion of the original right of way lying and remaining within the right of way pertaining to the revised center line.

It is the appellant's contention that, since the appellee admits that it is constructing its line according to the revised location, shown on the amended map, "all rights by virtue of the old line and by virtue of the old map must fall."

As remarked by the District Judge, the right of way granted to the company by the Government could be disposed of only in two ways; first by the company's voluntary act, and second, by a forfeiture declared by the Government for breach of the conditions of the grant. It is clear that the appellee has not voluntarily parted with any portion of the right of way acquired by the approval of the first map, except the twenty foot strip which it relinquished to the United States. The only other question to be considered, therefore, is whether the filing of the map of amended definite location, and the construction of the railway according to the survey shown on that map, though still within the original right of way, amounts to an abandonment or waiver of the

rights acquired by the approval of the first map. We expect to show, first, that there has been no abandonment of the old right of way, or breach of the conditions upon which it was granted, and second, that even if there has been an abandonment, no one can assert it or take advantage of it, except the United States.

No rights across the appellant's homestead are claimed by the appellee by virtue of the approval of the map of amended definite location. Its claim is based solely upon the approval of the original map, and the fact that its railroad is being built on the right of way which it acquired thereby. Appellant's position seems to be that, since the railway company's second map showed the amended location of the entire line, from one end to the other, and not only those portions lying without the original two hundred foot strip, it has elected to abandon all rights under the first approval, and its right to construct the entire line must rest upon the approval of the second map.

Now, it is apparent that no right of way across the land entered by appellant could have been acquired by the filing of the second map, on July 31, 1909, without the condemnation of the appellant's interest therein, since he had settled upon the land in September, 1907. Clearly, therefore, the map of 1909 was not filed for the purpose of securing any right of way across these lands. Furthermore, under the regulations of the Interior Department, requiring the filing of a new map only "in case of deviation from the right of way previously approved," it is

apparent that even if the land had been unsettled, there was no necessity of filing a new map of the road, so far as these lands were affected, since the deviation amounted to only twenty feet, leaving the company eighty feet of right of way on one side of its center line, and one hundred and twenty feet on the other, which was ample for the necessities of the railway.

It may be inquired then, why the railway company showed its entire line on the new map, and not only those portions crossing unsettled lands, and lands where there was a deviation from the original right of way. The answer is that this was done in compliance with the act, requiring the maps to be filed in twenty mile sections, and with the regulations of the Interior Department, directing the maps to show "the termini of the line of the road," and "any other road crossed or with which connection is made." (See Circular of May 21, 1909, 37 L. D. 788.) It is apparent that a map showing the entire route would be much more convenient, both to prepare and to read, than a map showing detached sections.

In addition to these considerations, the company undoubtedly wished to secure a right of way one hundred feet wide on each side of the revised center line, even when the deviation from the old line was slight, across lands which had not been settled between the filing of the two maps. But that there was no intention of abandoning its rights under the original filing and approval, is clearly shown by the terms of the relinquishment, which reserved and ex-

cepted all the right of way pertaining to the old line, remaining within the limits of the right of way pertaining to the new.

Appellant asks whether, if the overlap on the two maps amounted to only twenty feet, the company could contend that it owned twenty feet under the approval of the old line, and 180 feet under the new. Answering this, we may say in the first place, that the case supposed is not parallel to the case at bar. A twenty foot overlap could only occur when the revised center line was moved 180 feet from the original survey, or 80 feet off the original right of way. In this case, the revised line remains on the old right of way, and the company's construction is confined to the right of way originally approved. But we are willing to answer the question squarely: First, if no rights had intervened between the filing of the two maps, there would be no necessity of claiming anything by virtue of the original approval, since the company's rights to the 200 foot strip pertaining to the revised line would be prior in any event to the rights of the settler. Second, if an intervening right had accrued between the approval of the two maps, and the company had not relinquished the original right of way, there is no question but that the railway company might claim title thereto as against the settler, and also as against the Government until a forfeiture of its rights under the original approval had been declared by the Government for failure to comply with the terms of the grant by constructing its railroad on the original right of way. This is a point

to be more fully discussed a little later in the brief.

It is unnecessary to discuss at length the other situation supposed by appellant's counsel, of two rights of way crossing at right angles. It is apparent that that would not be an amended definite location of the original line.

The contention of the appellant that the original right of way has been lost by deviating from the center line shown on the original map rests upon the argument that, because the grant is of a right of way "100 feet wide on each side of the central line of the railway," the limits of the right of way are determined solely by reference to the center line shown on the map; and that the right of way fixed and determined by the old map must be lost to the railway when it leaves the center line "which fixed the right of way."

The argument of appellant leads to this conclusion: that whenever a railway company deviates, even in the slightest degree, in the construction of its road, from the line shown on the map approved by the Secretary of the Interior, it loses all rights acquired by the approval. According to this argument, a deviation of one foot, is just as fatal as a deviation of twenty feet. The company must exactly follow the center line shown on the map; otherwise, all rights acquired by the approval of the map, are lost. This leads one to wonder why a right of way 200 feet in width was granted by Congress. A much narrower strip is required for the construction and operation of a railway line. It might be thought that the addi-

tional width was for station grounds, etc., were it not that section 1 makes ample provision for station buildings, depots, machine shops, sidetracks, turnouts and water stations.

It is very probable that no railway was ever built strictly according to the line previously surveyed, no matter how careful the survey may have been. The construction engineer almost invariably finds that changes from the surveyed line are necessary, when the road comes to be actually graded. It is frequently found that a slight change here and there will operate advantageously in the disposition of material. A quantity of rock or earth taken from a cut may frequently be used in the construction of an adjoining fill, if a slight alteration in the center line is made, where otherwise the material would have to be secured elsewhere. It must have been in anticipation of contingencies of this character that the 200 foot strip was granted. That this has been the construction of the act in the Land Department is shown by the requirement of filing a new map only "in case of deviation from the right of way previously approved," contained in the Circular of May 21, 1909, 37 L. D. 788, heretofore quoted in full, and similar instructions in the earlier circulars issued under the act which we have referred to in the opening paragraphs of the argument.

Appellant cites the cases of *Missouri, etc., R. Co. v. Cook,* 163 U. S. 491, and *Washington & I. R. Co. v. Coeur d'Alene, etc., R. Co.* 160 U. S. 77, as having some bearing upon this issue, but examination of

those decisions shows that they are not even remotely in point. In both of those cases the Railway Company had deviated in the construction of its line to the extent of something like a mile, from the center line shown on the map of definite location, and the court held that the construction of the line under these circumstances could have no effect on the right of parties in the land crossed by the constructed line, which had intervened between the filing of the map and the building of the railway.

Even If the Facts Showed a Breach of the Conditions Upon Which the Original Right of Way Was Granted, Title Thereto Would Remain in the Appellee Until the Declaration By the Government of a Forfeiture of the Grant.

We have endeavored to demonstrate that no abandonment of the original right of way is shown by the fact that the railroad is being constructed according to the amended location shown on the new map. We now proceed to show that even if the facts did show an abandonment of the original right of way, no one could take advantage of it except the Government.

The granting act contains the following condition of forfeiture:

> "Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

Appellant's claim of abandonment rests upon an alleged breach of this condition, his argument being

that the construction of the road according to a different center line than that shown on the approved map, amounts to a failure to build the line under the authority granted..

The above and similar provisions in Congressional grants of lands and rights of way have often been considered by the Supreme Court, and in all the cases in which the question has been passed upon, the failure to complete the road within the time limited has been treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the Government to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress resuming title to the lands.

Thus, in the leading case of *Schulenberg v. Harriman,* 88 U. S. 44, 22 L. Ed. 551, the Act of Congress granting lands to the State of Wisconsin to be sold and the proceeds applied in aid of the construction of a railroad, provided in what manner the sales should be made, and enacted that if the road were not completed within ten years no further sales should be made, and the lands should revert to the United States. That was decided to be no more than a provision that the grant should be void, if the condition subsequent were not performed. Mr. Justice Field, delivering the opinion of the court, said:

> "It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial

person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. * * * And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed."

A case in point upon both the facts and the law is *Bybee v. Oregon and California R. Co.*, 139 U. S. 663, 33 L. Ed. 305. The plaintiff was the owner of an interest in a ditch acquired under an Act of Congress "granting the right of way to ditch and canal owners over the public lands, and for other purposes." His occupation dated from the month of May, 1879. The railway company claimed the right to build its railroad across this ditch upon a right of way granted to it by Congress in 1866. The granting act, as amended, provided that the road should be completed by July 1, 1880, and that in case the company should not complete the road within the time limited "this Act shall be null and void, and all the lands not conveyed by patent to said company, at the date of any such failure, shall revert to the United States." The company did not complete the road within the time required by the act, and when, some time thereafter, it built its road across the plaintiff's ditch, he sued to recover for the damages to the ditch occasioned by the construction of the railroad, alleging that its rights were forfeited. But the court held that the company did not lose the power to take possession of

its right of way by its failure to construct its road within the time limited by the granting act, and that the lands granted did not revert, even though the condition upon which they were granted had been broken, until the assertion of a forfeiture by the United States.

The latest case dealing with the subject is *Spokane & B. C. R. Co. v. Washington & G. N. R. Co.,* 219 U. S. 166, 55 L. Ed. 159, in which the earlier cases are reviewed. The syllabus of that case, which correctly states the court's decision, is as follows:

> "A breach of the conditions upon which a railway right of way was granted *in praesenti* by the act of June 4, 1898 (30 Stat, at L. 430 chap. 377), *viz.,* that the railway company shall commence grading within six months after the approval of the map of definite location, or its location shall be void, and that the right therein granted shall be forfeited unless the company shall construct 25 miles of road within two years after the passage of the act,—does not of itself work a forfeiture, but such conditions being conditions subsequent, there can be no forfeiture without some appropriate judicial or legislative action."

The railway is now being constructed across the land entered by the appellant, within the limits of the right of way acquired by the approval of the original map. Unless it be held that a divergence of a few feet in construction from the center line shown on that map, is a failure to construct the road in accord-

ance with the terms of the grant, it is clear that not even the Government can declare a forfeiture. But if this deviation does constitute a breach of the conditions upon which the right of way was granted, amounting to an abandonment of the grant, it is established by the cases cited, and many others, that no one can take advantage of the company's failure to construct the line as required by the granting act, except its grantor, the Government. The appellant is not entitled to urge it. Until the United States sees fit to assert and enforce a forfeiture for breach of conditions, the title to the right of way remains unimpaired in its grantee.

No Significance Is to Be Attached to the Fact That Appellant's Patent Contained No Reservation of the Right of Way.

Reference is made in appellant's brief in several places to the fact that his patent contained no reservation of appellant's right of way, and in one place the statement is made that "the issuance to appellant of a patent to all the land in controversy, without reserving any right of way for railroad purposes, is an adjudication by the Executive Department that the rights of the railroad date from the filing of the new map, and are inferior to those of the appellant." In support of the latter statement we are invited to see *Smith v. N. P.*, 58 Fed. 513. Reference to this case shows that no such statement was made by the court, nor is there any intimation that any inference is to be drawn from the issuance of a patent, without reservations.

That no significance is to be attached to the issuance of a patent, without reservation of right of way, is shown by the act itself, which declares that after the approval of the right of way map and the notation of the railway line on the plats in the Land Office "all such lands over which such right of way shall pass shall be disposed of, subject to such right of way." In other words, the rights of a railway company and a settler entering the same land, are fixed by the act, and not by any conditions or recitals in their muniments of title.

In *Northern Pac. Ry. Co. v. Townsend,* 190 U. S. 267, 47 L. Ed. 1044, which was a contest between the railway company and the grantees of homestead settlers, involving title to a portion of a 400 foot right of way granted to the railway company, the court, referring to a contention that some significance was to be attached to the issuance of patents to the homesteaders without reservation of the railway company's right of way, said:

> "At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands, subject to preemption and sale, and the Land Department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within

the right of way, because of the fact that the grant to them was of the full legal subdivisions."

And in *Rio Grande Western R. Co. v. Stringham* (Utah), 110 Pac. 868, the court held that on approval by the Secretary of the Interior of the profile of the proposed railroad through public lands, in accordance with the act of March 3, 1875, the title to the right of way vested in the Railway Company, and the subsequent patent of land, including the right of way, though not made subject thereto, did not divest the title so acquired. The court said:

> "Nor is it made to appear whether the mineral patent issued to Treweek in 1889 was in terms made subject to the right of way, but since section 4 of the act provides that 'all such lands over which such right of way shall pass shall be disposed of, subject to such right of way' it again will be presumed, in the absence of a showing to the contrary, that the subsequent disposition made to Treweek was subject to the right of way, and in any event since the title to the right of way vested in plaintiff's predecessor, upon the secretary's approval of the profile of its road, it matters not whether the subsequent grant to Treweek was or was not in terms made subject thereto, for the law itself made it so. *Rd. Co. v. Baldwin,* 103 U. S. 426, 26 L. Ed. 578; *Northern Pacific Ry. Co. v. Townsend,* 190 U. S. 267, 47 L. Ed. 1044."

The reason why the Land Department does not except railroad rights of way in patents to lands

crossed by them, is well stated in the Circular of Instructions under the act of 1875, issued May 21, 1909.

"1. *Nature of grant.*—A railroad company to which a right of way is granted does not secure a full and complete title to the land on which the right of way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and such patentee takes the fee, subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right of way has attached, take the same subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this department."

37 L. D. 788.

We respectfully submit, in conclusion, that the

map filed by the Washington & Great Northern Railway Company on January 2, 1907, was a "profile" within the meaning of that term in the act of March 3, 1875; but that its sufficiency was established, in any event, by the approval of the Secretary of the Interior; that no part of the right of way acquired by the approval of that map has been lost or abandoned by the appellee, except the strip relinquished to the United States; that even if there had been an abandonment, the appellant could not assert it, nor anyone else except the Government. The District Judge was correct in concluding that the defendant is claiming nothing more than was granted to it by Congress, and the decree dismissing the complainant's bill should be affirmed.

Respectfully submitted,

F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Solicitors for Appellee.

No. 2304

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE M. TAGGART,
Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellee.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

REPLY BRIEF OF APPELLANT

ARGUMENT.

The Word "Profile" in the Act.

There are a few points made in the brief of appellee which must be met by appellant in order that the real issues of law in this appeal may not be obscured.

Appellee cites several definitions of the word

"profile" which do not assist it in the least. After they are carefully read and digested it will become apparent that the word "profile" means just what this court said it meant in the case of *United States vs. Minidoka, S. W. R. Co.,* 190 Fed. 491. In other words, a profile of a railroad is a vertical section showing elevations, depressions and grades. It would be impossible to make any of the definitions quoted by appellee apply to the map of alignment filed by the railway company in January, 1907.

Appellee insists that a profile map could not be noted upon the plats in the local land office. There is nothing in the record or as a matter of fact which will justify such a statement. This court will not assume that a profile map of a railroad would be a wholly unintelligible thing or that it would consist of a mere undulating line unattached to any particular subdivisions of the public land. Counsel argue that a map such as we contend for would be wholly unintelligible; that it would not show the subdivisions of the public lands crossed by the road. This statement we challenge. A profile map must of necessity refer to some particular section of land. It would not be complete if it did not do so. Appellee admits on page 20 of its brief that it did at one time file with the Register of the local Land Office at Waterville a profile of its entire line; that such a profile was filed for the use of the Geological Survey to enable that bureau to determine whether withdrawn lands would be affected by the railway. Will the appellee please explain how a profile could be of such use to the Geological Survey if such a map is

wholly unintelligible and does not in any particular refer to the subdivisions of the public lands. We arrive at the inevitable conclusion that a profile is different from a map of alignment and is a wholly *intelligible* and practical instrument. Instead of the construction contended for by appellant being restricted and technical as stated by appellee, it is obviously the only natural and common one.

Appellee relies strongly upon the fact that the Secretary of the Interior did not call upon the railway company for a profile until November 17, 1910. We can discover no reason why the Secretary of the Interior should be under any obligation to call upon the railroad for the proper map at any time. The initiative should lie with the railroad. If it desires to obtain the rights granted by the acts of Congress it should comply with the requirements of those acts.

Another strange doctrine relied upon by the appellee is stated at the bottom of page 23 of its brief, i. e. that the filing of a profile is a condition subsequent and the failure to so file can only be taken advantage of by the government. This is a strange doctrine indeed. The appellee has no rights in this case unless the facts show that it has acquired a right-of-way under the Act of March 3, 1875, by a compliance with the terms of that act. In no other way can such a right by obtained. And yet appellee maintains that even though it has not filed a profile within the meaning of the act, still no advantage of that fact can be taken by appellant. Appellee does not seem to realize that it must show a compliance with the act. It is not a question of taking advantage of the

failure to file a profile. Rather it is the direct question, has a profile been filed? For if it has not then appellee never acquired any rights.

Attention is again called to the provisions of the law of March 3, 1875, in which words are used as follows:

> "And *thereafter* all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way."

It cannot be denied that prior to the filing of a profile required by the act, rights initiated by a homestead entryman in the public lands are prior to those of the railroad. This is true because of the use of the word *"thereafter"* in the act. Instead of appellant not being able to take advantage of the fact that no profile was filed, appellee has the burden of showing that one was filed.

II.

The Effect of the Approval by the Secretary.

Appellee argues that the approval of the 1907 map by the Secretary of the Interior is an adjudication of the sufficiency of the map. It is difficult to see how the approval of an instrument can rise any higher than the instrument itself. The fact that a certain instrument was approved by the Secretary of the Interior is of no force whatever unless it can be shown that such instrument was the one required by law. The fact that the Secretary of the Interior has approved of a map of alignment is of no more importance than the Secretary's approval of a certified copy of the appellee's articles of incor-

poration. Since appellee can acquire no rights until it obtains the approval of the Secretary upon the very instrument required by the act, surely it cannot justify its trespass upon appellant's land by alleging and proving that it has obtained the approval of the Secretary to a different instrument. It must show something more than that it has obtained the approval of the Secretary to an instrument. It must show that that approval is attached to the very instrument required by law.

It is argued that the approval of the Secretary is a judicial act and the case of *Noble vs. Union River Logging Railroad Co.*, 147 U. S. 165, is cited. It is conceded that the approval of the Secretary upon the instrument required by the law is a judicial act in the sense that it is not ministerial. It is a judicial act also in the sense that when once given it cannot be revoked. The Noble case simply holds that the Secretary of the Interior cannot revoke his approval; that his approval is similar to the issuance of a patent and that if fraud has been committed in obtaining the approval resort must be had to the courts. This is far from a decision that the approval of the Secretary is an adjudication of the rights of settlers upon the public lands which conflict with those of the railroad. It must be remembered that the Secretary has issued to the appellant a patent in fee simple for the land claimed by the railroad in this action. Even if we were to concede that the railroad had in this case filed a profile map as required by law, it would still be a question

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III.

The Filing of the second Map.

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for the courts to determine as between conflicting grants of the land office.

It would be strange indeed if a court should hold that although the act requires the railroad to file a profile the same rights could be obtained by filing another instrument and obtaining the approval of the Secretary to that. It thus becomes apparent that it is incumbent upon this court to determine as an original proposition whether the Act of Congress has been complied with by the appellee.

III.

The Filing of the Second Map.

Appellee states in substance that although it is building its line according to the route shown in the second map filed, it claims title to its right-of-way across appellant's land by reason of the first map. It explains frankly enough that the purpose of the company in filing its amended map across the land of appellant was undoubtedly to acquire a full one hundred feet upon either side of the new line. It is apparent from this situation that the railroad claims one hundred feet on each side of the amended map where it is enabled to do so. It treats the amended map as a new initiation of its rights, and where the rights of a settler have not attached then both the right to construct as against the government and the title as against the settler date from the date of filing the second map. But when the rights of settlers have intervened it claims under the original map. Surely such a double-barreled position will not be permitted. If the rights in one

instance date from the amended map, then they would in all instances. The position of appellee is clearly illustrated by its admission on page 34 of its brief, as follows:

> "First, if no rights had intervened between the filing of the two maps, there would be no necessity of claiming anything by virtue of the original approval."

But the strange doctrine contended for by appellee on page 37 of the brief is that even though appellee may have abandoned the old right-of-way, that fact cannot be raised in this action. This is in effect contending that even though appellee has in fact abandoned the old right-of-way, it still owns the title to that right-of-way across appellant's land. It is not clear how a railroad can abandon a right and still own it. Abandonment is a fact, and when conceded by appellee no rights covered by the abandonment can be relied upon. Appellee comes into this court saying: "We claim to own a right-of-way across appellant's land by reason of a right-of-way determined by a map filed in 1907; we concede for the sake of argument that we have abandoned that old right-of-way and yet that fact is not material in this action." It is hard to follow such reasoning.

Counsel cites several cases which hold that the proviso in the act of March 3, 1875, that the road must be built within five years, is a condition subsequent and is a matter which can only be raised by the government. We concede that such is the law, but we are unable to see any analogy between a con-

dition subsequent contained in the granting act and a substantive fact of abandonment. Abandonment is a state of affairs, a condition, a fact. Abandonment arises where the railway company does some act which in itself amounts to abandonment, and therefore any attempt to liken the situation to a failure by a railroad to construct within the time limit required by the act is wholly vain and useless. When appellee contends that appellant cannot show that there has been an abandonment in fact of the map under which appellee claims its rights, its contention amounts to a claim that appellant cannot go into the question of the title of the railroad at all. The absurdity of this position is so apparent that no further discussion is necessary.

CONCLUSION.

For the foregoing reasons and for those set forth in the original brief of appellant we maintain:

First, that the Great Northern Railway Company never, prior to the initiation of appellant's rights in the land in question, acquired any right-of-way under the Act of March 3, 1875.

Second, that if it did so acquire a right-of-way by the filing of a map of alignment, it abandoned said rights as against appellant when it initiated its rights over again by the filing of the second map of alignment.

Respectfully submitted,

C. J. FRANCE,
FRANK P. HELSELL,
Solicitors for Appellant.